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IN THE

Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

Petitioner,

v.

THE STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy Attorney General for Medicaid Fraud,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI

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Questions Presented for Review

1. Whether under *Santobello* v. *New York*, 404 U.S. 257 (1971) and *Blackledge* v. *Allison*, 431 U.S. 63 (1977), federal due process requires enforcement of a plea bargain established as entered into but which is not explicitly set forth on the allocution record.

2. Whether federal due process as defined by *Boykin* v. *Alabama*, 395 U.S. 257 (1977), prohibits a state from shifting the burden of establishing the voluntariness of a guilty plea to a defendant and his counsel where the sentencing judge has failed to make an on-the-record inquiry whether any promise induced the plea.

3. Whether the Second Circuit's holding that a state may apply a "statute of frauds" rule that a judicially established plea bargain which has not been placed on the sentencing record by a defendant is unenforceable violates due process and represents a significant conflict with the other Circuit Courts of Appeal.

4. Whether, under *Sumner* v. *Mata*, 449 U.S. 539 (1981), the Second Circuit erroneously reversed without explanation the findings of the District Court Judge who complied with 28 U.S.C. §2254(d) by accepting the fact findings of the state courts.

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Citations to Opinions

The October 22, 1982 decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed reversing the District Court and dismissing the petition/complaint is not yet officially reported and is reproduced in Appendix A.

The June 15, 1982 decision and order herein of the United States District Court for the Southern District of

New York granting petitioner a preliminary injunction is not yet officially reported and is reproduced in Appendix B.

The opinion and order of New York State Supreme Court Justice Balbach finding and enforcing the plea bargain herein and modifying respondent's grand jury subpoena is unreported and is reproduced in Appendix C.

The opinion of the Appellate Division of the New York State Supreme Court unanimously affirming Justice Balbach is reported at 83 A.D. 2d 630, 441 N.Y.S. 2d 698 (2nd Dept. 1981) and is reproduced in Appendix D.

The opinion and order of the New York Court of Appeals reversing the Appellate Division is reported at 55 N.Y. 2d 116, 447 N.Y.S. 2d 905, 432 N.E.2d 777 (1982) and is reproduced in Appendix E.

The certification of the New York Court of Appeals that it passed upon petitioner's due process claim that his "federal constitutional rights are violated by the requirement that, once a record is made of the terms of a plea bargaining agreement, all promises made to the pleading defendant must be made a part of that record before they will be enforced" is reported at 56 N.Y. 2d 570, 450 N.Y.S. 2d 186, 435 N.E.2d 403 (1982) and is reproduced in Appendix F.

The March 5, 1981 decision and order of the New York State Supreme Court, New York County, denying petitioner's motion to withdraw his plea is unreported and is reproduced in Appendix G.

Jurisdictional Grounds for Review

The judgment of the Second Circuit Court of Appeals was entered on October 22, 1982. Appendix A.

A timely petition for rehearing and suggestion for reconsideration in banc was denied on December 3, 1982.

On November 15, 1982, the Second Circuit stayed its mandate pursuant to App. Rule 41(b) pending application to this Court for a writ of certiorari.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Involved

This case involves Section 1 of the Fourteenth Amendmen to the United States Constitution, 28 U.S.C. §2254(d), 42 U.S.C. §1983, N.Y. Constitution, Article VI, §3(a), N.Y. Criminal Procedure Law §§ 440.10(1)(h) and 440.20(1), and N.Y. CPLR 5501(b), (c).

These provisions are set out verbatim in Appendix H.

Statement of the Case*

In January 1979, petitioner, a wholesale meat salesman, pleaded guilty in the New York State Supreme Court, New

* The facts here stated are as found by the decisions of the courts which made fact findings in the litigations between the parties—see Appendices B, C, and D—and in petitioner's unrebutted petition/complaint and moving affidavits in the District Court. Respondent has not filed an answer or affidavits to contravene these statements. On the present record, the constitutional and other issues raised are therefore unclouded by factual questions.

York County, to one count of a multi-count perjury indictment which alleged that, in testifying before a New York County grand jury, petitioner had falsely denied knowledge of or involvement in improper payments to the health care industry.

The plea resulted from discussions suggested by the state trial judge who, in denying petitioner's motion to dismiss for defects in the indictment and in the interest of justice, said that the case was in "a gray area" and "appriate for disposition" (Appendix D, at 50a).

From the outset of these discussions, petitioner's counsel informed the court and respondent special prosecutor that petitioner would not consider a plea unless he would not be sentenced to jail and, to allow him to continue to earn his livelihood in his industry, unless he not be required again to talk or be questioned about the subjects of his grand jury testimony; and the prosecutor assented. The court accordingly stated that it would accept the plea. See p. 18, *infra*, and Appendices C and D.

On the record of the allocution, the court, noting petitioner's prior "exemplary" record and the problems faced by one in petitioner's employment, sentenced him to five years probation, which he is now serving, and a $2,500 fine.

Although the prosecutor referred to off-the-record discussions "at the Bench" (Appendix C, at 42a), the court made no formal inquiry whether any promises had induced the plea.* However, the court did not require petitioner to

* The state Appellate Division emphasized as "conspicuously absent" the "oft-posed question" whether promises were made to induce the plea (Appendix D, at 57a)—a constitutionally critical fact *not* noted by the Second Circuit Panel below in its otherwise accurate statement of the facts.

re-appear before the grand jury or to talk to the special prosecutor as a condition of receiving the sentence. And although the prosecutor had earlier represented to the court that petitioner had information important to the government, he made no effort to re-call petitioner before the grand jury or to question him again.

Six months later, another assistant in the Queens County office of the same special prosecutor, who did not know of the plea bargain, subpoenaed petitioner to appear before the Queens County grand jury.

Petitioner moved to quash the subpoena. The Queens County branch of the New York Supreme Court held a two-day evidentiary hearing at which petitioner's counsel and the assistant prosecutor who had negotiated the plea testified. That court found that the prosecutor had knowingly induced petitioner's guilty plea on the understanding, of which the sentencing court was aware, that petitioner would not again be questioned about the subjects of the grand jury testimony that led to his indictment. Invoking *Santobello*, it accordingly modified the new subpoena to limit inquiry to matters not covered by petitioner's New York County testimony. Appendix C.

These findings were expanded and the result unanimously affirmed by the Appellate Division in the exercise of its statutory power to make its own factual findings. Appendix D. N.Y. CPLR 5501(c). Appendix H, at 76a.

New York State's Constitution and statutes deny to its Court of Appeals jurisdiction to review or modify fact findings made by an Appellate Division in affirming a trial

court. N.Y. Constitution, Art. XI, §3(a); N.Y. CPLR 5501(b). Appendix H, at 75a.

Without disturbing the fact findings of the state Supreme Court in Queens or of the Appellate Division, the New York Court of Appeals nonetheless reversed on the ground that the hearing should not have been held (as "unnecessary") because petitioner's counsel had not placed the promise on the record when the plea was entered. Appendix E.

The state Court of Appeals acknowledged that this was the first time that it applied such a rule where the plea bargain was uncontradicted by the record and where the sentencing judge and the prosecutor complied with the bargain.* That Court also held it to be a "mere fact" that the sentencing court, which was aware of and honored the bargain, had not asked whether any promise induced the plea, stating that even though in "every case" the judge should ask that question, the defendant had the "burden"

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* In two earlier decisions, the New York Court of Appeals ruled that such a promise could not be asserted to contradict a thorough *Boykin* record which repudiated the existence of a claimed promise (*People* v. *Selikoff*, 35 N.Y.2d 227, 242-43, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974), *cert. den.* 419 U.S. 1122 (1974) and *People* v. *Frederick*, 45 N.Y.2d 520, 526-27, 410 N.Y.S.2d 555, 382 N.E.2d 1332 (1978)). However, it later enforced off-the-record promises which were not so contradicted (*Chaipis* v. *State Liquor Authority*, 44 N.Y.2d 57, 404 N.Y.S.2d 76, 375 N.E.2d 32 (1978)) and upheld the right to a hearing to establish off-the-record promises (see *People* v. *DeForna*, 53 N.Y.2d 1006, 442 N.Y.S.2d 476, 425 N.E.2d 864 (1981); *People* v. *McConnell*, 49 N.Y.2d 340, 425 N.Y.S.2d 794, 402 N.E.2d 133 (1980); and *People* v. *Wheaton*, 45 N.Y.2d 769, 408 N.Y.S.2d 498, 380 N.E.2d 324 (1978)). In this case, the record neither refutes the plea bargain nor did defendant disclaim one.

of placing the promise on the record, if the court fails to inquire, at the risk of losing its benefit. Appendix E, at 67a-68a.

Petitioner thereupon moved in the New York County Supreme Court, where he had been prosecuted, to withdraw his plea in view of the unenforceability of the agreement by which it had been induced. That motion was denied as barred by the ruling of the Court of Appeals, and leave to appeal was denied. Appendix G.

Having exhausted his state remedies, petitioner brought this federal habeas corpus proceeding/Civil Rights Act (42 U.S.C. §1983) suit in the United States District Court for the Southern District of New York and moved for a preliminary injunction against enforcement of the Queens subpoena.* As noted (fn., p. 3, *supra*), respondent did not file an answer or opposing affidavits.

The District Court (Sweet, J.) granted the injunction after its own review of the testimony and also because it found a sufficient basis for the findings of fact of the only jurisdictionally competent state courts that the claimed promise had in fact been made and violated. Appendix B. See 28 U.S.C. §2254(d). Appendix H, at 73a-74a.

A Second Circuit Panel (Judge Pratt, dissenting) reversed the injunction and dismissed the petition/complaint on the ground that previous decisions of the state Court of Appeals had signalled the state's intention to adopt a "stat-

* The District Court's jurisdiction was conferred by 28 U.S.C. §§2254 and 1343.

ute of frauds'' rule* for plea bargains and that such a state rule does not violate federal due process. Appendix A.

The Second Circuit did not address the District Court's ruling that, under 28 U.S.C. §2254(d), there was a presumption of correctness for the Queens County and Appellate Division findings, after a full adversarial hearing, that the proven plea bargain in this case is entitled to specific performance. The Panel's dismissal further precluded a hearing on petitioner's alternate claim to withdraw his plea in view of its manifest involuntariness if the bargain is not honored.

Reasons for Granting the Writ

1. The Second Circuit's decision is inconsistent with the controlling decisions of this Court in *Santobello, Boykin, Blackledge,* and their progeny, that federal due process requires that a defendant receive his reasonable expectations in a plea bargain; indeed, under the Second Circuit's ruling below, *Santobello* could not have been decided as it was;

2. The decision below conflicts with the prior holdings of this Court that it is the non-delegable duty of the court to

* The Second Circuit's majority opinion introduces this phrase into the decisional literature of plea bargains. The rule was not so characterized by the New York State Court of Appeals nor, so far as our research shows, in any decided case since *Santobello.* At most, furthermore, *Selikoff* and *Frederick, supra,* state no more than a "parol evidence"-type rule, not a per se "statute of frauds" rule, that a defendant may not offer evidence to contradict the terms of a clear record which disproves a plea bargain. Other authorities reject such a commercial law analogy in the due process area of plea bargaining. *Cooper* v. *United States,* 594 F.2d 12, at 16-17 (4th Cir. 1979). See generally, Westen and Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal.L.Rev. 471 (1976).

make a full record to establish the voluntariness of a plea and that its failure to meet its *Boykin* responsibility leaves it open to a defendant to show that his plea was not voluntary; and

3. The Second Circuit Panel's decision below creates a novel, impractical, and unconstitutional per se "statute of frauds" rule which conflicts with the decisions of this Court and of the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits and clouds the law of plea bargains in derogation of the due process concerns which justify the plea bargain process in the administration of criminal justice.

POINT I

The Decision Below Is a Clear Break With This Court's Holdings in *Santobello, Blackledge,* and Their Progeny, That a Defendant Is Entitled to His Reasonable Expectations Created by a Plea Bargain.

The present record establishes that the prosecutor made but later violated the plea bargain that petitioner would not again be required to talk or to give any information about the subjects of his grand jury testimony that led to his prosecution. Correspondingly, in addition to the state findings, the record below includes petitioner's unrebutted affidavit that he would *not* have pleaded guilty if he had not relied on the prosecutor's promise.

This case is indistinguishable from *Santobello.* Here, as in *Santobello,* petitioner was represented by counsel. Here, as in *Santobello* (404 U.S. at 259), the "second prosecutor, apparently ignorant of his colleague's commitment,

argued that there was nothing in the record to support petitioner's claim of a promise. . . ." (In this case, unlike *Santobello,* the prosecutor, at the sentencing proceedings, specifically referred to an off-the-record "conference at the Bench".) And on the unrebutted record, as in *Santobello* (404 U.S. at 262-63), the "plea rests [to a] significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement. . . ."

The Second Circuit holding invites a prosecutor to induce a plea then to violate his commitment because a defendant has not volunteered an answer to a question the judge did not ask because the judge knew and approved of the answer without asking. However, *Santobello* requires only that "the essence of the promise must *in some way* be made known" (404 U.S. at 261; emph. added); it does not hold that the defendant is required to put the promise on the record when the court and prosecutor know of and comply with it.

In *Blackledge* this Court rejected the very rule the Second Circuit has now endorsed for New York. Said Justice Stewart, ". . . the federal courts cannot fairly adopt a per se rule excluding all possibility" that what a defendant later says concerning the circumstances of the plea must be disregarded. 431 U.S. at 75, citing (431 U.S. at 73-74) *Fontaine* v. *United States,* 411 U.S. 213 (1973).

Contrary to *Santobello* and *Blackledge,* the court below has endorsed a "statute of frauds" rule which, it says (Appendix A, at 11a-12a),

> "furthers the integrity of the process by requiring that the *entire* agreement be placed on the record and by treating off-the-record promises as void"

• • •

> "In view of the salutary policies fostered by the New York rule [the statute of frauds applied to plea bargains] we cannot conclude that it offends the constitutional concept of due process."*

This holding, however, does nothing to effectuate the policies it states:

The failure to fulfill the bargain obviously does nothing to enhance the likelihood of petitioner's guilt. To the contrary, its effect is to brand one in petitioner's circumstances a felon without the benefit of the bargain on the basis of a plea to an indictment of questionable validity where it was the judge who initiated the plea discussions because, in his words, the case was in a "gray area". Nor does the majority decision of the Panel encourage more openness than there was in the negotiations in this case, of which the sentencing court was fully aware. And finality was achieved but for the chance intrusion six months later of another assistant who was a stranger to the promise.

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* As Judge Pratt succinctly said (Appendix A, at 16a): "Desirable as it may be from the point of view of administering cases in the state courts, I do not believe the 'statute of frauds' rule adopted by the New York Court of Appeals and approved by the majority is permissible under *Santobello* v. *New York* [citation], and *Blackledge* v. *Allison* [citation]."

POINT II

The "Statute of Frauds" Rule Applied in This Case Violates *Boykin* by Impermissibly Shifting the Duty of Making a Record Which Establishes the Voluntariness of a Guilty Plea from the Court, Where This Court Has Placed It, to the Defendant.

The New York Court of Appeals decision, approved here by the Second Circuit, held:

> "The court should, in every case, ascertain on the record that no other promises have been made on which the defendant might be relying. If the court fails to make this determination, however, it is nevertheless the defendant's burden, on pain of losing the claimed promise, to inform the judge accepting the plea of all promises that were made to induce his plea that are not otherwise revealed." (Appendix E, at 67a-68a)*

This ruling, as now approved by the Second Circuit, violates a long line of cases in this Court which emphasize that due process requires that a sentencing court take pains to assure that a waiver of the basic constitutional rights effected by a plea of guilty is knowingly and understandingly made. E.g., *Henderson* v. *Morgan*, 426 U.S. 637, 645 n. 13 (1976); *Smith* v. *O'Grady*, 312 U.S. 329 (1941); *McCarthy* v. *United States*, 394 U.S. 459 (1969).

This Court in *Boykin* made it the constitutional responsibility of the judge, not of a defendant or his counsel, to make a complete record to do this. The objectives of assur-

* A supposed exception for the "rare case" (see Appendix A, at 9a and 12a, and Appendix E, at 67a) is meaningless since the fact of the bargain, established after a full hearing actually held, makes this a "rare case." Nor is this a post-*Blackledge* situation where a defendant has disavowed the existence of a promise.

ing guilt, avoiding secretiveness, and achieving finality are hindered, not furthered, if the penalty for the judge's failure to perform his *Boykin* duty is shifted to the defendant, who is least able and has least reason to correct the judge's default. (Even if it were in a defendant's interest to put the promise on the record, it might not be of equal advantage to either the prosecutor or the court, for example, in a case of a negotiated light sentence to a particularly violent or serious crime.)

The *Boykin* responsibility must therefore necessarily rest upon, and only upon, the trial judge because a guilty plea induced by an unfilled promise is not voluntary. *Brady* v. *United States*, 397 U.S. 742 (1970); *Santobello, supra*, at 262-263, 266. Therefore such a plea may not be accepted without the constitutionally required determination by the court "that a defendant's guilty plea is truly voluntary." *McCarthy* v. *United States, supra*, at 465-66.

This determination must be made by the court because

> "by personally interrogating the defendant, not only will a judge be better able to ascertain a plea's voluntariness, but he will develop a more complete record to support his determination in a subsequent post-conviction attack." *Id.* at 466.

POINT III

The Holding Below Conflicts With Decisions in the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits.

Post-*Santobello* decisions in other circuits uphold a defendant's right to a hearing to establish a plea bargain when the sentencing court fails to make a record which clearly refutes its making. As required by *Santobello*, *Blackledge*, and *Boykin*, these Circuits thus recognize the due process right to a hearing, even in the face of contradictory statements in the allocution record, if a defendant makes a factual showing to support his claim—something petitioner actually did at a hearing held, the results of which the court below denies him:

First Circuit: *Correale* v. *United States*, 479 F.2d 944 (1st Cir. 1973) (defendant entitled to resentencing to conform, so far as then possible, to possibly misunderstood unfulfilled prosecution promise to defendant and his attorney). See also *Mawson* v. *United States*, 463 F.2d 29 (1st Cir. 1972).

Third Circuit: *Patrick* v. *Camden County Prosecutor*, 630 F.2d 206 (3rd Cir. 1980) (violation of plea bargain by state prosecutor entitled defendant to relief, but remedy referred to state court). Cf., *United States* v. *American Bag & Paper Corp.*, 609 F.2d 1066, 1068 (3rd Cir. 1979); *U. S. ex rel. Culbreath* v. *Rundle*, 466 F.2d 730 (3rd Cir. 1972) (ambiguous on-the-record reference at time of plea to precise terms of off-the-record agreement between counsel).

Fourth Circuit: *United States* v. *Hammerman*, 528 F.2d 326, 331-32 (4th Cir. 1975) (despite record denial that he was promised a no prison sentence, in view of imprecise on-the-record interrogation to exclude claimed unfulfilled promise, defendant entitled to a hearing). See also, *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. den.* 417 U.S. 933 (1974); *Edwards* v. *Garrison*, 539 F.2d 1374 (4th Cir. 1975); *Cooper* v. *United States*, *supra* (enforcement merely on basis of defendant's reasonable expectations).

Fifth Circuit: *United States* v. *McCord*, 618 F.2d 389, 392-93 (5th Cir. 1980) (hearing granted despite sentencing record which clearly contradicted claimed bargain); *Geisser* v. *U.S.*, 513 F.2d 862 (5th Cir. 1975), *on app. after remand*, 554 F.2d 698 (5th Cir. 1977) and, again, 627 F.2d 745 (5th Cir. 1980) (government must specifically perform plea bargain it repudiated because such a bargain "fits well within the realm of enforceable constitutional rights"). See also *United States* v. *Blair*, 470 F.2d 331 (5th Cir. 1972) (plea vacated as involuntary because trial judge did not inform defendant on-the-record of maximum sentence).

Seventh Circuit: *United States* v. *Cook*, 668 F.2d 317, 319-21 (7th Cir. 1982) (plea withdrawal permitted because of reliance on unfulfilled promise). See also, *United States* v. *Bowler*, 585 F.2d 851 (7th Cir. 1978).

Eighth Circuit: *United States* v. *Minnesota Mining, etc.*, 551 F.2d 1106, 1110-11 (8th Cir. 1977) (inviolability of government's promise which induced plea). See also *United States* v. *Runck*, 601 F.2d 968 (8th Cir. 1979); *United States* v. *Scharf*, 551 F.2d 1124 (8th Cir. 1977), *cert.*

den. 434 U.S. 824 (1977) (court's failure to develop terms of plea bargain on-the-record).

Ninth Circuit: *United States* v. *Arnett,* 628 F.2d 1162 (9th Cir. 1979) (defendant entitled to evidentiary hearing to establish alleged plea bargain), holding (at 1164), contrary to the ruling below herein:

> "What the parties agreed to in instant plea bargain is a question of fact. . . . Resolution of the good faith disputes over the terms of an agreement should be made by the district court, to whom the plea was originally submitted, on the bassi of adequate evidence,"

citing *United States* v. *Simmons,* 537 F.2d 1260 (4th Cir. 1976).

Eleventh Circuit: *Rowe* v. *Griffin,* 676 F.2d 524, 528 (11th Cir. 1982) (federal court injunction against state prosecution in violation of oral immunity agreement).

POINT IV

The Circuit Court Below Violated *Sumner* v. *Mata* and Ignored 28 U.S.C. §2254(d) Without Giving the Required Explanation.

In habeas proceedings, 28 U.S.C. §2254(d) requires a federal court to presume state court findings of fact to be correct unless it explains the reasons for departing from them. *Sumner* v. *Mata,* 449 U.S. 539, 546-50 (1981), after *rehearing,* —— U.S. ——, 71 L.Ed2d 840 (March 22, 1982).

Based upon its review of the full record of the state court proceedings, including the record of the Queens

County evidentiary hearing and the subsequent proceeding under N.Y. Criminal Procedure Law §§ 440.10 and 440.20, the District Court, in accord with 28 U.S.C. §2254(d)(8), found that "[a] review of the record presented to [Queens County Supreme Court] Judge Balbach establishes that the findings of the state court are supported by the record." (Appendix B, 30a-33a, at 32a.)

In view of the two-day hearing record, these findings were not clearly erroneous. They therefore must be affirmed by this Court. *LaVallee* v. *Della Rose,* 410 U.S. 690, 692, 695 (1972).

While this case is unusual (the Second Circuit called it "novel") in that it was the prosecutor who disputed and the Second Circuit which upset the finality of these undisturbed state court findings of fact, 28 U.S.C. §2254(d) nevertheless prohibits relitigation of such findings unless, as was not here the case, the merits were not resolved or the hearing was otherwise unfair. 28 U.S.C. §2254(d)(1)-(7).

The Second Circuit ruling below did not even consider the requirement that it state its reasons for disregarding the undisturbed state findings of fact in this case. See *Lonberger* v. *Jago,* 651 F.2d 447 (6th Cir. 1981) (defendant represented by "competent and capable counsel" but writ issued because court failed to make a satisfactory *Boykin* record); *Sumner* v. *Mata, supra.*

The Appellate Division (Appendix D, at 57a) found:

> ". . . based upon both our review of the record and the findings of Criminal Term, including its implicit findings with respect to credibility of witnesses, we con-

> clude that when the prosecutor indicated his assent that under the plea bargain petitioner would not be required by his office to 'give information', 'talk about' or 'be questioned about' matters covered in his Grand Jury testimony, he thereby gave his knowing consent that petitioner was not to be called before a Grand Jury by his office to discuss those matters."

In giving the background for this conclusion, that court observed (*id.*, at 54a):

> ". . . the plea bargain provided that, as a result of petitioner's having agreed to a felony, he would not be required to 'give information', 'talk about' or 'be questioned about' the matters covered in his perjury indictment. To petitioner's counsel this bargain barred any future Grand Jury testimony by petitioner concerning such matters. According to them, their client's primary concern throughout the plea negotiations had been to insure that he would be shielded from having to give any information, whether before a Grand Jury or otherwise, concerning his dealings with customers and others in the health care industry. This concern arose from petitioner's fear that if it ever became known that he had given such information he would be unable to continue to work as a commission meat salesman, his sole occupation for at least the preceding 18 years. Thus, petitioner's counsel portrayed the plea bargain, in essence, as one in which petitioner, who had no prior criminal record, and a good reputation, agreed to forego a possibly successful defense to the prosecution and to accept the ignominy of a felony conviction in return for being permitted to avoid giving information by which he would severely jeopardize his livelihood."

The Second Circuit, ignoring these findings and those of the District Court, instead said that the promise ". . . was

a nullity at the time the plea was accepted" and "therefore [petitioner's] reliance on the promise was unreasonable and is entitled to no recognition." Appendix A, at 15a. By footnote, the court added, in patent double-speak, that

> "Because Siegel's purported reliance on the constructive promise found by the Appellate Division was unreasonable as a matter of law, the promise cannot 'be said to be part of the inducement or consideration . . . [which] must be fulfilled. *Santobello,* 404 U.S. at 262.' " *Id.*

But as this Court has said in *Sumner* v. *Mata,* —— U.S. ——, 71 L.Ed2d 480, at 486 (1982):

> ". . . the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear."

In the case at bar, the Second Circuit has paid less attention to the mandate of Section 2254(d) as applied by this Court than did the Ninth Circuit in *Sumner.*

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
HAROLD I. CAMMER
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December 29, 1982

APPENDIX A

October 22, 1982 Decision and Judgment of Second Circuit Court of Appeals herein Reversing the District Court and Dismissing Petition/Complaint (*Siegel* v. *State and Kuriansky*)

Before: VAN GRAAFEILAND, PIERCE and PRATT, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge,* specifically enforcing an off-the-record plea agreement that plaintiff would not be required to testify before a New York State grand jury with regard to certain matters and, accordingly, enjoining defendants from so questioning plaintiff.

Injunction vacated and cause remanded with an instruction to dismiss the complaint.

PIERCE, *Circuit Judge*:

This case presents the novel issue of whether federal due process requires a state prosecutor to fulfill an off-the-record promise made in plea bargaining negotiations,[1] despite New York State's announced policy of enforcing only those portions of a plea agreement which are actually placed on the record at the plea proceeding. The United States District Court for the Southern District of New York, Robert W. Sweet, Judge, found that such a promise must be enforced and, accordingly, enjoined the state prosecutor from breaching the promise. Because we find that New York State's policy of recognizing only on-the-record plea bargains comports with due process and because the

1. Both the state trial court and the Appellate Division made factual findings, and concluded that a plea bargaining promise existed and should be enforced, each basing the result on different reasoning. *Matter of Benjamin S.,* 55 N.Y. 2d 116, 118-20 (1982).

plaintiff, in offering his plea, failed to place on the record the promise which he now seeks to enforce, we vacate the injunction and remand to the district court with an instruction to dismiss the complaint.

I

A. *State Court Proceedings*

Plaintiff-appellee, Benjamin Siegel, is a 63-year-old wholesale meat salesman. In March, 1979, Siegel testified before a New York County grand jury investigating alleged criminal activities in the nursing home industry. Siegel denied ever discussing or paying kickbacks to persons in the nursing home industry, and he denied any knowledge of other persons in the meat industry paying such kickbacks.

Following his testimony, Siegel was indicted in New York County on three counts of perjury in the first degree, a class D felony. Siegel entered a plea of not guilty. On November 21, 1979, Judge Aloysius Melia[2] denied Siegel's motion to dismiss the indictment and several other motions, and granted a motion to suppress one of the tape recordings which was to be used as evidence. Judge Melia remarked that the case appeared suited to disposition by a negotiated guilty plea.

On January 21, 1980, in a reported hearing in open court, the prosecutor, a Special Deputy Attorney General assigned to the New York City regional office of the Hospital Division of the Deputy Attorney General for Medicaid Fraud, and the appellee and his counsel informed Judge

2. Judge Melia was a Judge of the Criminal Court of the City of New York, sitting by designation in the Supreme Court, New York County.

Melia that Siegel was prepared to plead guilty to a single reduced count of perjury in the second degree, a class E felony, in exchange for dismissal of the other counts and the promise of a sentence of five years probation plus a fine. After ascertaining that Siegel was acting of his "own free will," that he understood the constitutional rights he was waiving by pleading guilty, and that he understood the sentence he would receive, Judge Melia accepted Siegel's guilty plea to a single count of perjury in the second degree and imposed a sentence of five years probation and a $2500 fine.

Six months later, on July 22, 1980, the Long Island regional office of the Deputy Attorney General for Medicaid Fraud issued a subpoena to Siegel seeking to have him testify before a grand jury investigating kickbacks in the health care industry. Siegel moved in Queens County Supreme Court to quash the subpoena claiming that, at the time of the plea, the prosecutor had made an off-the-record promise that Siegel would not have to testify before the grand jury concerning the subject matter of his perjury indictment. Justice George Balbach, to whom the motion was assigned, conducted an extensive evidentiary hearing with regard to the circumstances surrounding the negotiation of Siegel's guilty plea. During this hearing Justice Balbach heard testimony from Siegel's two defense attorneys and from both the New York City and the Long Island Special Deputy Attorneys General handling the case. By opinion dated December 17, 1980, Justice Balbach granted Siegel's motion to the extent of modifying the subpoena to preclude the prosecutor from questioning Siegel about "those facts which were discussed during his prior appearance before the New York County Grand Jury

on March 13, 1979." *Matter of John Doe,* SP No. 4164, slip op. at 16 (Sup. Ct. Queens Co. Dec. 17, 1980). Although the trial judge found that the prosecutor made "no definite promise" concerning future grand jury appearances, the judge found that the prosecutor's equivocal responses during plea negotiations led Siegel to reasonably believe that he would not subsequently be obliged to testify before a New York State grand jury with respect to the subject matter of his previous New York County grand jury testimony.

In a memordandum opinion dated July 27, 1981, the Appellate Division, Second Department, affirmed. *Matter of Benjamin S.,* 83 A.D.2d 630, 441 N.Y.S.2d 698 (2d Dep't 1981). The appellate court found that there was no record support for the lower court's finding that the specific issue of future grand jury appearances had been raised in the plea negotiations. Nonetheless, the Appellate Division ruled that the prosecutor's statements to the effect that Siegel would not be required to "give information," "talk about," or "be questiined about" matters covered in his previous grand jury testimony constituted "knowing consent that [Siegel] was not to be called before a Grand Jury by [the prosecutor's] office to discuss those matters." 83 A.D.2d at 633, 441 N.Y.S.2d at 703. The Appellate Division also ruled that specific performance of the constructive plea bargain would not impermissibly infringe upon the right of the Queens County grand jury to gather evidence.

In a unanimous opinion dated February 18, 1982, the New York Court of Appeals reversed the Appellate Division's order. *Matter of Benjamin S.,* 55 N.Y.2d 116, 447

N.Y.S.2d 905, 432 N.E.2d 777, *reh'g denied*, 56 N.Y.2d 570, 450 N.Y.S.2d 186, 435 N.E.2d 403 (1982). The court ruled that the alleged promise concerning future grand jury appearances was unenforceable, as a matter of law, because it was not placed on the record at the time the guilty plea was entered.

Shortly thereafter, Siegel moved pursuant to N.Y. Crim. Proc. Law § 440 (McKinney 1971) to reopen his plea proceedings and place on the record the alleged off-the-record promise or, in the alternative, for a vacatur of the judgment of conviction. In support of this motion Siegel contended that his plea of guilty and the conviction based thereon were procured by the prosecutor's misrepresentation concerning future grand jury appearances, in violation of his due process rights. By opinion and order dated March 5, 1982, the New York County Supreme Court, Trial Term, denied the motion, stating that the relief requested was essentially identical to the relief previously rejected by the New York Court of Appeals. Both the Appellate Division and the New York Court of Appeals denied leave to appeal.

B. *Proceedings Below*

On May 13, 1982, Siegel filed a complaint in the Southern District of New York, alleging that his federal due process rights were violated when the prosecutor failed to fulfill his promise that Siegel would not be required to testify before the grand jury concerning his prior testimony. The complaint was founded on the federal habeas corpus statute, 28 U.S.C. § 2254, and the federal statute forbidding deprivation of constitutional rights under color of state law, 42 U.S.C. § 1983. Siegel sought either an order permitting

him to withdraw his guilty plea or, alternatively, an order reopening the state plea proceedings and placing the alleged off-the-record promise on the record.

On May 17, 1982, Judge Sweet, upon plaintiff's application, signed an order directing the defendants-appellants, State of New York and Edward J. Kuriansky, Deputy New York Attorney General for Medicaid Fraud, to show cause why they should not be preliminarily enjoined from requiring Siegel to be questioned concerning matters covered by his previous grand jury testimony. To accommodate the district court and opposing counsel, the State agreed that Siegel would not be called before the grand jury prior to June 16, 1982.

By opinion dated June 15, 1982, the district court granted Siegel's requested preliminary injunction. *Siegel* v. *State of New York*, No. 82 Civ. 3095 (S.D.N.Y. June 15, 1982). The district court did not apply this Circuit's settled preliminary injunction standard,[3] but fully discussed and finally determined the merits of Siegel's complaint. The court stated that "[t]he action of the Court of Appeals has served, in the view of this court, to deprive Siegel of his due process right to enforce his plea bargain and to challenge the voluntariness of his plea." It further stated that "[g]iven the resolution of the issue of the existence of

3. For a preliminary injunction to issue in this Circuit, the plaintiff must show:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Friarton Estates Corp. v. *City of New York*, 681 F.2d 150, 152 n.2 (2d Cir. 1982).

an off-the-record agreement by the Appellate Division and its affirmance of the quashing of the subpoena by the Supreme Court, the writ of habeas corpus will be granted to enforce the plea bargain and to quash the subpoena." *Id.*, slip op. at 4. Because the district court has fully and finally adjudicated the claims raised in Siegel's complaint, we will review the decision as if it were a permanent, rather than a preliminary injunction. *See* Part IV *infra*.

II

In *Santobello* v. *New York*, 404 U.S. 257, 260-61 (1971), the Supreme Court endorsed the process of plea bargaining as not only an "essential" but also a "highly desirable" component of the administration of criminal justice which, if "[p]roperly administered, . . . is to be encouraged." Plea bargaining benefits both the accused and society because it leads to prompt and final disposition of cases; it avoids "the corrosive impact of enforced idleness during pretrial confinement;" it protects the public from defendants who might commit additional crimes while released from jail before trial; and it enhances rehabilitative prospects by shortening the time between charge and disposition. *Id.* at 261; *see Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Because endorsement of plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor," *Santobello, supra*, 404 U.S. at 261, the Supreme Court requires the process to be "attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262.

In 1974, the New York Court of Appeals began to move toward promulgating a rule barring enforcement of any promise made by the prosecutor to the defendant which

was not contained in the record of the plea proceeding. *See People* v. *Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974), *cert. denied*, 419 U.S. 1122 (1975). In *Selikoff* the Court of Appeals jointly considered three cases. In one of those cases the Court rejected a claim that there had been an off-the-record promise that the sentence would not exceed four years, because the trial judge, on the record, had explicitly stated that the defendant would receive a sentence of three to ten years. 35 N.Y.2d at 244. In one of the other cases, the court refused to enforce an off-the-record promise that the prosecutor would not object to defendant's motion to set aside the plea if a prison term was imposed where the defendant had stated on the record that there was no inducement other than the prosecutor's non-binding promise to recommend no imprisonment. 35 N.Y. 2d at 241-42. At the close of his opinion for an unanimous court, Chief Judge Breitel noted that in the future many problems attending plea bargaining could be eliminated by placing the entire agreement on the record and by the court refusing to recognize any other purported agreement except in "the most unusual circumstances." 35 N.Y.2d at 244.

In *People* v. *Frederick*, 45 N.Y.2d 520, 410 N.Y.S.2d 555, 382 N.E.2d 1332 (1978), the trial court informed the defendant at the plea allocution that no promises were being made concerning the sentence to be imposed. The defendant acknowledged the trial court's statement and the court accepted his guilty plea. Eighteen months later, but prior to imposition of sentence, defendant's counsel alleged that at the time of the plea the court had promised the defendant off-the-record that it would allow the defendant to withdraw his plea if the sentence exceeded the prosecutor's recommendation. The trial court denied making such a

statement and rejected defendant's motion to withdraw his guilty plea. Thereafter, having considered the prosecutor's recommendation of a term of probation, the court sentenced defendant to an indeterminate four year prison term. The Court of Appeals affirmed the conviction, stating that "[i]f the court had indeed assured defendant's counsel that it would follow the prosecution's sentence recommendation during an off-the-record bench conference, it was incumbent upon defendant's attorney to place that promise, in unmistakable terms, on the record." 45 N.Y.2d at 526. Like Chief Judge Breitel in *Selikoff*, Judge Jasen ended the unanimous *Frederick* opinion by stressing "the importance of placing the entire agreement reached by the parties through plea negotiations on the record." 45 N.Y.2d at 528. *Accord, People* v. *McConnell*, 49 N.Y.2d 340, 346, 425 N.Y.S.2d 794, 402 N.E.2d 133 (1980) (dicta); *People* v. *Da Forno*, 73 A.D.2d 893, 424 N.Y.S.2d 195 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 1006, 442 N.Y.S.2d 476, 425 N.E.2d 864 (1981).

The New York Court of Appeals rule of *Selikoff* and *Frederick* is, in essence, a "statute of frauds" rule for plea bargaining: the courts, except in rare cases, will enforce only the bargain placed on the record at the time of the plea. Stated differently, with the exception of unusual cases, off-the-record promises made by the prosecutor or the court are a nullity and, accordingly, the defendant may not reasonably rely upon them; the defendant is entitled to rely only on the recorded promises.

The foregoing New York state policy fulfills three important policy objectives. As detailed below, it increases the likelihood that factual guilt underlies a proferred plea of guilty; it enhances the integrity of the plea bargaining process; and it assures finality of convictions.

Appendix A

A. *Enhancing Certainty of Guilt*

The procedural rights guaranteed to the accused by the United States Constitution reflect the high premium our nation places upon preventing innocent persons from being falsely or wrongly convicted. To protect the defendant from falsely accusing himself by pleading guilty, due process requires an affirmative showing that a guilty plea is intelligently and voluntarily entered. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *see Brady* v. *United States*, 397 U.S. 742, 758 (1970).

With respect to pleas offered after negotiations and in reliance on inducements or promises, the possibility of false convictions is greater than with respect to non-induced pleas. The prosecutor may offer an innocent defendant an inducement so attractive that the defendant may perceive it to be in his self-interest to make a false confession of guilt. *See* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. 471, 493-98 (1978).

The New York rule, by recognizing as enforceable only those inducements that are placed on the record before the trial judge, gives the judge a more complete opportunity to determine whether the defendant's plea is intelligently and voluntarily entered. Since the defendant in a New York court knows that his failure to place on the record promises upon which he has relied will result in non-enforcement of those promises, he and his counsel will be more likely to apprise the trial judge of the entire agreement. Consequently, there is a greater likelihood that the trial judge will be aware of the entire plea agreement when called upon to evaluate the voluntariness of the defendant's plea. Under these circumstances, the trial judge can more

accurately determine whether the inducements offered are so attractive, when compared to the risk of proceeding to trial, as to override even an innocent person's decision to stand trial.[4] In other words, the New York rule, by requiring that the parties place the entire plea agreement on the record before the trial judge, allows the trial court a fuller opportunity to determine objectively whether the guilty plea is intelligently and voluntarily made, *i.e.*, by an independent review of the complete agreement, rather than by reliance solely upon the statements of the defendant who may, for various reasons, be inclined to conceal inducements from the court. The New York rule, then, enhances the court's ability to judge the voluntariness and intelligence of a defendant's decision to plead guilty, and, thereby, reduces the likelihood of false convictions.

B. *Integrity of Process*

The New York rule requiring that plea bargains be fully disclosed on the record eliminates the "clandestine atmosphere" which previously attended the plea bargaining process. *See Frederick, supra,* 45 N.Y.2d at 526. The rule furthers the integrity of the process by requiring that the *entire* agreement be placed on the record and by treating off-the-record promises as void. The resulting enhancement of integrity and of the *appearance* of integrity is particularly beneficial in light of the very high percentage of criminal cases in New York that are necessarily disposed of by plea rather than trial.

4. If the trial court found that the inducements were patently overwhelming, it could reject plaintiff's plea of guilty in the exercise of sound judicial discretion. *Santobello* v. *New York*, 404 U.S. 257, 262. A defendant possesses no absolute right to have a guilty plea accepted. *Id.* (citing *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962)).

C. *Finality*

The Supreme Court in *Blackledge, supra,* 431 U.S. at 71, noted that "the chief virtues of the plea system—speed, economy, and finality"—are undercut by indiscriminate post-conviction proceedings. *See also id.* at 83-84 (Powell, J., concurring) (stressing the importance of finality to a system of justice). Because a defendant who complies with the New York rule is, in all but the rarest instances, unable to claim the benefit of a purported off-the-record promise following the acceptance of his plea, the rule serves to reduce the number of collateral attacks on convictions based on guilty pleas. Consequently, the New York rule promotes finality of judgments, and, thus, strengthens the efficacy of the plea process. The rule thus serves an important societal goal.

In view of the salutary policies fostered by the New York rule, we cannot conclude that it offends the constitutional concept of due process. To the contrary, the rule promotes openness, certainty, and finality of plea proceedings. Furthermore, assuming the defendant is aware that off-the-record promises by the prosecutor are void—not an unreasonable assumption given the defendant's right to counsel at the plea proceeding, *see Mempa* v. *Rhay,* 389 U.S. 128, 134 (1967)—the memorialization in the record of all promises upon which he relies will best protect the defendant's post-conviction expectations.

III

In the present case, Siegel claims that the off-the-record constructive bargain found by the Appellate Division should be honored because the trial judge failed to inquire explicitly as to any inducements, aside from the promise of no imprisonment, upon which Siegel relied.

Appendix A

As previously stated, a trial judge is required to ascertain that a defendant's guity plea is intelligently and voluntarily made before accepting it. *Boykin* v. *Alabama*, 395 U.S. 238 (1969). According to *Boykin*, a case in which *no* questions were put to the defendant by the judge at the time he pleaded guilty, the thrust of the trial court's inquiry should be directed toward the defendant's waiver of his privilege against self-incrimination, his right to a jury trial, and his right to confront witnesses. *Id.* at 243. Neither *Boykin* nor any other Supreme Court or Second Circuit case that deals with due process requirements applicable to the states (as opposed to the specific requirements made applicable to federal criminal cases by Fed.R.Crim.P. 11) has held that a court must explicitly ask a defendant whether his guilty plea is entered as a result of any promises or inducements on the part of the prosecutor.[5] Rather than mandating a specific catechism, in determining voluntariness and intelligence, due process requires only that the courts provide safeguards sufficient "to insure the defendant what is reasonably due in the circumstances." *Santobello, supra*, 404 U.S. at 262.

Here, the trial judge ascertained, through Siegel's affirmative responses to the court's questions, that Siegel understood the constitutional rights he was waiving by pleading guilty. Further, Siegel responded affirmatively to the court's inquiry: "Are you pleading guilty to this crime of your own free will?" The trial judge informed the appellee that he would sentence him to five years probation and impose a fine. Siegel then responded affirma-

5. Though *dicta* in *United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 845 n.1 (2d Cir. 1975), suggests that *Boykin* imposed upon the states, as a matter of due process, the requirements of Fed.R.Crim.P. 11, the surrounding discussion in that case concerned only the waiver of constitutional rights, a matter with regard to which Siegel was properly interned.

tively to the trial court's question: "And do you understand everything that has happened here today?" Throughout the colloquy, Siegel and his two experienced attorneys made no mention on the record of the alleged agreement not to require testimony about the subject matter of his prior grand jury testimony, even though Siegel later asserted that the off-the-record promise was critical to his decision to plead guilty. In these circumstances, we conclude that the non-enforcement of the promise of the prosecutor does not deprive Siegel of due process.

Since in this case Siegel was represented by counsel throughout the plea bargaining process and the plea proceeding, and since both Siegel and his counsel had the opportunity to place the off-the-record promise on the record, as New York law requires, we find, on the facts of this case that due process was satisfied.[6] Siegel's claim that off-the-record promises were not considered unenforceable under prevailing New York law at the time of his plea, and that therefore his counsel could not have known of his burden to place on the record the promise upon which he relied, is without merit. As discussed above, *Selikoff* and *Frederick*—which were decided in 1974 and 1978, respectively—prior to Siegel's plea in January 1980—held that off-the-record promises would not be enforced where an inconsistent promise was on the record or where the defendant stated at the time he pleaded that no other promises had been made. In addition to their explicit holdings, both *Selikoff* and *Frederick* made it clear that, to be enforceable,

6. Placing on the defendant and his competent counsel the burden of putting on the record all promises relied upon in offering the plea is consistent with the Supreme Court holdings that, in the context of federal collateral attacks, a plea is intelligently and voluntarily entered so long as it is based upon the advice of competent counsel, even if successful defenses to the charges existed. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *McMann* v. *Richardson*, 397 U.S. 759 (1970).

a plea agreement normally had to be on the record. Indeed, *Frederick* expressly stated that the *defendant* had the burden of placing on the record promises upon which he relied and which he would seek to enforce in the future. 45 N.Y.2d at 526.[7] Thus, Siegel, through his counsel, knew, or should have known, at the time of the plea, that off-the-record promises were unenforceable, and therefore he should have undertaken to place his entire understanding of the plea bargain on the record for the trial judge's review—as well as possible appellate or collateral review.

In conclusion, because the promise relied upon by Siegel was not placed on the record and, hence, was a nullity at the time the plea was accepted, Siegel's reliance on that promise was unreasonable and is entitled to no recognition.[8] Non-recognition of this promise by the New York courts and the appellants did not violate federal due process since Siegel, through counsel, knew or should have known that the off-the-record promise was unenforceable. Accordingly, Siegel is neither entitled to vacatur of his plea nor specific performance of the off-the-record constructive agreement found by the Appellate Division.

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7. Predictably, the New York Court of Appeals in *Matter of Benjamin S.* held that the *Selikoff* and *Frederick* holdings applied where the defendant had *not* expressly stated that no other promises or inducements were made. 55 N.Y. 2d at 120.

Siegel contends that *Chaipis* v. *State Liquor Authority*, 44 N.Y. 2d 57, 404 N.Y.S.2d 76, 375 N.E.2d 32 (1978), shows that the *Selikoff-Frederick* rule was not well established and thus could not have been reasonably known to his counsel at the time he pleaded guilty. This is not so. First, *Chaipis* predated *Frederick*. Further, it is not clear from the reported opinion that the state's promise to bring the defendant's cooperation to the attention of the State Liquor Authority was on the record. In any event, in *Chaipis* the prosecutor had in fact informed the Liquor Authority of defendant's cooperation.

8. Because Siegel's purported reliance on the constructive promise found by the Appellate Division was unreasonable as a matter of law, the promise cannot "be said to be part of the inducement or consideration . . . [which] must be fulfilled." *Santobello*, 404 U.S. at 262.

IV

As stated at the end of Part I *supra,* although the district court's order was cast as a preliminary injunction, that court unequivocally adjudicated the merits of the complaint and entered what is in effect a permanent injunction. In *Almenares* v. *Wyman,* 453 F.2d 1075, 1088 (2d Cir. 1971), *cert. denied,* 405 U.S. 944 (1972), Judge Friendly treated a preliminary injunction as a permanent injunction, noting that—as is the case here—"there seems to be nothing preliminary about theorder that was issued" and "[t]here was no suggestion that the parties return to the court with further evidence or argument which might lead to modification of the injunction." In this case, the district court rendered final relief and its order is properly considered a permanent injunction.

Since we have concluded that plaintiff-appellee is entitled to no relief on the allegations of his complaint, and the district judge has had an opportunity to fully address the merits of the complaint, we believe it is appropriate to direct final relief at this time. Accordingly, the injunction entered below is vacated and the action is remanded to the district court with instructions to dismiss the complaint and enter final judgment for defendants.

PRATT, Circuit Judge, dissenting:

Desirable as it might be from the point of view of administering criminal cases in the state courts, I do not believe that the "statute of frauds" rule adopted by the New York State Court of Appeals and approved by the majority is permissible under *Santobello* v. *New York,* 404 U.S. 257 (1971), and *Blackledge* v. *Allison,* 431 U.S. 63 (1977). Therefore, I respectfully dissent.

APPENDIX B

June 15, 1982 Decision and Order herein of the U.S. District Court for the Southern District of New York Granting Preliminary Injunction (*Siegel* v. *State and Kuriansky*)

SWEET, D.J.

In this action brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2254, Benjamin Siegel ("Siegel") has moved by order to show cause for a preliminary injunction to restrain defendants, the State of New York and Edward Kuriansky, Deputy New York State Attorney General for Medicaid Fraud Control, from taking any action to require Siegel to talk to or be questioned about matters related to his prior grand jury testimony or, in the alternative, to vacate his prior plea of guilty. As set forth below, the motion will be granted, Siegel having been denied his due process right to enforcement of a state court plea bargain and to challenge the voluntariness of his plea of guilty.

Siegel's action, which mirrors the preliminary relief sought here, arose after the New York Court of Appeals denied his motion to quash the grand jury subpoena at issue here which admittedly seeks testimony on the subject matters which are alleged to be the plea bargain. *In re Benjamin S.*, 55 N.Y. 116, 447 N.Y.S.2d 905. Familiarity with the state court opinions, *In re Benjamin S.*, S.P. No. 4164 (S.Ct. Queens County, Dec. 17, 1980), *aff'd*, 83 A.D.2d 630, 441 N.Y.S.2d 968 (2d Dep't 1982) is assumed.

Appendix B

The Facts

In March 1976 Siegel testified before a New York County Grand Jury investigation alleging criminal activities in the health care industry in New York. As a result of his testimony he was indicted on three counts of perjury. After pleading not guilty, negotiations were entered into, and an agreement was reached pursuant to which Siegel, on January 21, 1980, pleaded guilty to one count of perjury in the second degree. The sentencing judge, the Honorable Aloysious Melia, promised that Siegel would receive probation commencing on that date. No questions were put to Siegel or to the state to determine whether the entire plea bargain had been spread upon the record.

Six months later a Special Assistant Attorney General in Long Island in a separate investigation, issued a subpoena concerning a separate matter. Siegel moved to quash or modify the subpoena so that he would not have to testify concerning events occurring prior to the New York County Grand Jury appearance. Siegel alleged an agreement had been entered into with the special prosecutor's office that he would not have to give information concerning matters that were the subject of his prior grand jury testimony in exchange for his undertaking to plead guilty.

Siegel moved to quash the subpoena before the Honorable George J. Balbach. The trial court reviewed the record and found that there was "*no* promise in this case that petitioner would never have to testify before a Grand Jury." Slip op. at 16. The trial court, however, also found that the prosecutor's responses in the plea negotiation were sufficient to cause Siegel to rely on them as representations,

thereby establishing that Siegel "did enter into a plea bargaining agreement regarding his non-appearance before any further New York Grand Jury." Slip op. at 13. Thus the subpoena was modified to reflect the agreement, and Siegel was not required to testify about facts discussed during his prior appearance on March 13, 1979 before the Grand Jury.

On appeal by the Deputy Attorney General, the Appellate Division reviewed the facts and, although it did not uphold fully the trial court's findings of fact, it affirmed the court's ruling requiring specific performance of the plea bargain. First, the court found no basis for the lower court's finding that there had been negotiations specifically concerning grand jury appearances. Second, the court found, contrary to the trial court, that the prosecutor could not be held to an aspect of the plea bargain to which he did not actually consent because of imprecise or equivocal statements. The court, however, concluded that the prosecutor indicated his knowing assent to the plea bargain that Siegel would not be called before the grand jury to discuss the matters discussed in the prior grand jury proceedings. 83 A.D.2d at 633, 441 N.Y.S.2d at 702-03.

The Court of Appeals reversed, holding that the claimed off the record promise was unenforceable because the terms of the plea agreement had not been placed upon the record. 55 N.Y.2d at 120-21, 447 N.Y.S.2d at 907. This was determined despite the fact that the claimed bargain did not contradict the plea that was on the record.

> The distinguishing factor in the present case, and one which the Appellate Division found to be dispositive on this issue, is that the promise now urged by peti-

tioner is not expressly contradicted by the record. We disagree that this factor mandates a departure from our policy of requiring that all terms of the plea agreement be placed on the record. Notwithstanding the emphasis that has previously been placed upon the existance of record contradiction of the promise later being claimed, we believe that the purposes of the plea bargaining process would best be furthered in the usual case by refusing judicial recognition of any off-the-record promise once a record has been made of the terms of the plea agreement. The mere fact that the court failed to ask or the defendant failed to inform the court of the existence of other promises or inducements should not entitle that defendant to attempt to prove that other inducements led him to plead guilty, particularly where, as here, the defendant is represented in the plea bargaining process by experienced counsel.

Thus, once the terms of a plea bargaining agreement are placed on the record, judicial recognition of additional promises or terms of the agreement will not be forthcoming except in rare cases.

Id., 447 N.Y.S.2d at 907.

Siegel then moved pursuant to N.Y.Crim.Proc.Law § 440 to reopen the plea and sentence proceedings to include on the record the alleged terms of the plea bargain and, in the alternative, to vacate and set aside the judgment of conviction, since it had been procured by a plea in violation of Siegel's substantive due process rights under the Constitution. The motion was denied by the Honorable Peter J. McQuillan in an opinion dated March 5, 1982. Siegel's application for leave to appeal was denied on April 1, 1982,

his application for reconsideration was denied on April 27, 1982, and the New York Court of Appeals denied leave to appeal.[1]

Siegel then filed this action seeking an injunction to prevent the State from requiring him to appear before the grand jury. Alternatively he seeks vacation of his plea. He moved by order to show cause for a preliminary injunction on May 17, 1982 at which time the Attorney General agreed to delay calling Siegel to testify before the grand jury until June 16, 1982 to accommodate the court and opposing counsel.

Conclusions of Law

By issuing the subpoena to Siegel and challenging the existence of the plea agreement the New York Attorney General has clearly indicated that Siegel's rights under the alleged agreement will not be respected. Since consideration of Siegel's claims by this court is not barred by the decision of the New York Court of Appeals due to the procedural nature of their decision, Siegel is free to assert his claims under the habeas corpus statute and Section 1983. Given the resolution of the issue of the existence of an off-the-record agreement by the Appellate Division and its affirmance of the quashing of the subpoena by the Supreme Court, the writ of habeas corpus will be granted to enforce the plea bargain and to quash the subpoena. The action of the Court of Appeals has served, in the view of this court, to deprive Siegel of his due process right to

1. These actions by Siegel satisfy the requiremens of exhaustion of state remedies.

enforce his plea bargain and to challenge the voluntariness of his plea.

In *Santobello* v. *New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498 (1971), the Supreme Court recognized that plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged." However, a guilty plea induced by a misrepresentation, including an unfulfilled promise, is grounds for relief, is not a voluntary plea and is subject to collateral attack. *Id.* at 267, 92 S.Ct. at 501; *Brady* v. *United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (A guilty plea induced by an unkept plea bargain is not voluntary); *Machibroda* v. *United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962). The form of relief, subject to the discretion of the trial court, is either specific performance of the plea agreement or withdrawal of the guility plea. *Santobello*, 404 U.S. at 263, 92 S.Ct. at 499. Such a claim under *Santobello* adequately sets forth a due process violation that can be entertained under the habeas corpus statute. *McPherson* v. *Barksdale*, 640 F.2d 780, 781 (6th Cir. 1981); *Patrick* v. *Camden County Prosecutor*, 630 F.2d 206, 208 (3d Cir. 1980).

In considering collateral attacks to guilty pleas the Supreme Court has refused to apply a *per se* rule rendering guilty pleas invulnerable to collateral attack even where the petitioner's contentions directly conflict with his statements made at the plea allocution. In *Fontaine* v. *United States*, 411 U.S. 213, 93 S.Ct. 1461 (1973), a prisoner sought relief pursuant to 28 U.S.C. § 2855 seeking to invalidate his guilty plea where he had acknowledged his guilt, the voluntariness of his guilty plea, and his understanding of the

charge and the consequences of the plea. In spite of the contradiction between the petitioner's claim, the record and the requirements of Rule 11, the court held that the petitioner was entitled to a hearing on his claim. Although the court recognized that a defendant "may not ordinarily" repudiate statements made to the sentencing judge, the court stated:

> [t]he objective of Fed. Rule Crim. Proc. 11, of course, is to flush out and reselve all such issues, *but like any procedural mechanism*, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.

411 U.S. at 215, 93 S.Ct. at 1462 (emphasis added; footnote omitted).

In *Blackledge* v. *Allison*, 431 U.S. 63, 97 S.Ct. 1621, the Supreme Court reaffirmed this principle in a case arising under § 2254.[2] In *Blackledge* v. *Allison*, the plea proceeding consisted of the judge reading a form in open court with thirteen printed questions concerning the charge and the voluntariness of the plea, including the question: Has anyone "made any promises or threat to you to influence you to plead guilty in this case?" to which defendant re-

2. Although the standards for the right to a hearing differ on cases involving federal and state prisoners, *compare* 28 U.S.C. § 2255 ("[u]nless the motion and the file and records of the case conclusively show that the prisoner is entitled to no relief") *with* 28 U.S.C. § 2243 ("unless it appears from the application that the appplicant or person detained is not entitled thereto"), the relief under § 2255 was intended to be "exactly commensurate" with the remedy afforded by § 2254. *Swain* v. *Pressley*, 430 U.S. 372, 381 n.14, 97 S.Ct. 1224, 1230 n.14 (1977). *See generally Blackledge* v. *Allison*, 431 U.S. at 74 n.4, 97 S.Ct. at 1629 n.4.

sponded "No," an answer which was recorded on the form. In spite of this statement the court stated:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible . . . .
>
> What *Machibroda* and *Fontaine* indisputably teach, however, is that the barrier of the plea or sentencing proceeding record, although imposing, is not invariably insurmountable. In administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

431 U.S. at 74-75, 97 S.Ct. at 1629 (footnotes omitted). Since the petitioners' claims were sufficiently supported by specific factual allegations, they were not so patently false or frivolous as to warrant summary dismissal. *Id.* at 78, 97 S.Ct. at 1631.

Similary in *United States* v. *McCord,* 618 F2d 389, 391 n.2 (5th Cir. 1980) the trial judge thoroughly examined the defendant and his attorney to make sure the entire agreement was on the record. Judge Wisdom, although noting that a defendant bears a heavy burden of overcoming a contradictory statement made in an in-court plea allocution, cited *Blackledge* and *Fontaine* and found that the defendant was entitled to a hearing on his habeas corpus petition, since there was no conclusive showing that the defendant

was entitled to no relief. *See also United States* v. *Hammerman*, 528 F.2d 326 (4th Cir. 1976); *Dugan* v. *United States*, 521 F.2d 231 (5th Cir. 1975). *Cf. Caputo* v. *Henderson*, 541 F.2d 979, 983 (2d Cir. 1976).

Here Siegel's petition included affidavits, testimony from prior proceedings, and two lower court opinions to establish the agreement upon which he relies. Thus from the face of the petition it does not appear that he is not entitled to relief. 28 U.S.C. § 2254. The application is not "palpably incredible," *Machibroda* v. *United States*, 368 U.S. at 495, 82 S.Ct. at 514, or so "patently frivolous or false," *Herman* v. *Claudy*, 350 U.S. 116, 119, 76 S.Ct. 223, 225 (1956) as to warrant summary dismissal.

Further, there has been no procedural default in the state court such that would bar consideration of this claim as an independent and adequate state law procedural ground for the decision as set forth in *Engle* v. *Isaac*, 50 U.S.L.W. 4376 (April 5, 1982) and *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). In *Davis* v. *United States*, 411 U.S. 233, 93 S.Ct. 1577 (1973) the court held that a federal prisoner under § 2255 could not raise a claim of a lack of due process, in that instance, the improper composition of a grand jury, if the issue had not been raised before trial unless the prisoner showed both "cause" for failure to assert the objection before trial and "prejudice" resulting therefrom. *Id.* at 243-45, 93 S.Ct. at 1583-84. This was extended in *Francis* v. *Henderson*, 425 U.S. 536, 96 S.Ct. 1708 (1976), to state prisoners making a similar challenge under Section 2254.

This "cause and prejudice" standard was further extended in *Wainwright* v. *Sykes*, 433 U.S. 73, 97 S.Ct. 2497

to procedural defaults occurring during the trial of a state criminal defendant, and confirmed in *Engle* v. *Isaac*, 50 U.S.L.W. 4376, where a defendant had failed to comply with a state law requiring contemporaneous objections to jury instructions.

> We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a procedural default must demonstrate cause and actual prejudice before obtaining relief.

Id. at 4382. *Cf. United States* v. *Frady*, 50 U.S.L.W. 4388 (April 5, 1982) ("Plain error" standard of Fed.R.Cr.P. 52(b) held inapplicable to actions brought under 28 U.S.C. § 2255).

With regard to the terms of a plea bargain it is certainly procedurally useful and even desirable from a public policy point of view, to place all the terms of the agreement on the record, since it leads to finality and complete disposition of the action at the plea allocution. *See People* v. *Frederick*, 45 N.Y.2d 520, 526, 410 N.Y.S.2d 555, 560 (1978); *People* v. *Selikoff*, 35 N.Y.2d 227, 244, 360 N.Y.S.2d 623, 638 (1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 806 (1975). However, to place such a procedure beyond challenge under any circumstances would negate the principles enunciated in *Fontaine* v. *United States* and *Blackledge* v. *Allison* and the statement in *Fontaine* v. *United States* that "like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge," 411 U.S. at 215, 93 S.Ct. at 1462, is equally applicable to this case. Judge Wisdom apparently reached a similar conclusion in *United States* v. *McCord*, 618 F.2d at 394, where

despite a thorough plea allocution under Fed.R.Cr.P. 11 the collateral attack was not barred. The availability of collateral attack is particularly significant here where the violation of the alleged plea bargain has been found to exist.

The requirement imposed in this case barring the enforcement of any plea agreement not spread upon the record is clearly distinguished from the requirement that a defendant immediately object upon the admission of an inculpatory statement or to errors in a jury charge. Such objections are immediately discernable and the prejudice resulting therefrom is immediately evident, contrary to the uncertainties presented to Siegel and his counsel. Requiring a defendant to object to the admission of relevant evidence enables the judge to correct any errors or establish a clear record for appeal concerning errors of which he may not otherwise be aware.

Although there are interests of finality in the plea bargaining process, these interests can only be protected and even then to a limited degree, by an adequate plea allocution by the judge to insure that a complete record of the agreement and its voluntariness is placed on the record.

Moreover, Siegel's claim addresses not only the process of his plea but its voluntariness. A guilty plea induced by an unkept plea bargain cannot be considered voluntary and is therefore void and subject to collateral attack. *Brady* v. *United States*, 397 U.S. at 1472; *Machibroda* v. *United States*, 368 U.S. at 493, 82 S.Ct. at 513; *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2d Cir. 1976), *cert. dismissed*, 431 U.S. 911, 97 S.Ct. 2166 (1977). Given the constitutional requirement of a finding that a guilty plea be truly voluntary, *McCarthy* v. *United States*, 394

U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969), a defefndant cannot be expected to object at the time of the plea to the involuntariness of his plea when the breach of the plea agreement has yet to occur thus further distinguishing this case from *Wainwright* v. *Sykes* and *Engle* v. *Isaac*. Therefore the cause and prejudice standard cannot be construed to apply to a state procedure precluding consideration under these circumstances of an off the record promise, particularly where in this case the defendant was not even asked whether there were any off the record inducements for his plea bargain. Such a question would undoubtedly have put the agreement on the record and avoided the necessity for these proceedings.

Even if the "cause and prejudice" standard were applicable, however, the requirements would have been established. With regard to cause for failure to assert timely the claim, the New York procedural rule precluding consideration of off the record promises, even though not contradicted by the record was first stated in Siegel's case before the Court of Appeals. Although at the time of Siegel's plea in January, 1980, the New York Court of Appeals had stressed the importance of placing the entire plea on the record and that other promises generally should not be recognized, *see People* v. *Frederick,* 45 N.Y.2d at 526, 410 N.Y.S.2d at 559 (1978); *People* v. *Selikoff,* 35 N.Y.2d at 244, 360 N.Y.S.2d at 638, the overall preclusive effect of the procedural rule, enunciated here for the first time, had not been set forth. In *Frederick* and *Selikoff* the trial judges painstakingly interrogated the defendants on the record to insure that they were not induced to plead guilty because of any undisclosed promises. The judges

questioned the defendants about the voluntariness of their pleas and the scope of the pleas. The claims asserted by the defendants were clearly contradicted by the statements on the record that there were no other promises or inducements made and it was on that basis that collateral attack was denied.

At the time of his plea Siegel was told by the judge that if he entered his plea of guilty he would be sentenced to probation for five years and, in addition, have to pay a fine. He was never asked whether this was the entire agreement or whether the prosecutor had agreed to any other arrangements or made any other promises in exchange for the plea of guilty. Further, contrary to the statement by the New York Court of Appeals, the record in its entirety establishes that the full scope of the agreement as found by the courts below was not set forth. The process did nothing to dispel the defendant's belief that his off the record agreement would be enforced. *Cf. Blackledge* v. *Allison,* 431 U.S. at 77, 97 S.Ct. at 1631 ("Neither lawyer was asked to disclose any agreement that had been reached. . . . The process did nothing to dispel a defendant's belief that any bargain struck must remain concealed," *quoted in People* v. *Fredrick,* 45 N.Y.2d at 527, 410 N.Y.S.2d at 560).

Moreover, the holding in *People* v. *Frederick,* was specifically limited by the fact that there was a clear contradiction between the defendant's claim and the record.

> In sum, we again stress the importance of placing the entire agreement reached by the parties through plea negotiations on the record. Parties must realize that "in all but the most unusual circumstances, no other purported agreement will be recognized." *People*

> v. *Selikoff*, 35 N.Y.2d [at] 244, 360 N.Y.S.2d [at] . . . Where, as in the present case, the minutes of the plea are unequivocal and refute any claim of an off-the-record promises [*sic*], no judicial recognition of defendant's allegations is warranted. The very integrity of the plea negotiating process so mandates.

45 N.Y.2d at 528, 410 N.Y.S.2d at 560. This was only determined after careful analysis of the plea allocution without mention of it being an absolute requirement. Thus the procedural rule precluding consideration of an agreement uncontradicted by the record was not clearly set forth, a fact amply supported by the fact that the Supreme Court and Appellate Division judges were unaware of the procedural bar thereby establishing cause for failure to put the promise on the record. *See also People* v. *Seminara*, 58 A.D.2d 841, 841 [*sic*], 396 N.Y.S.2d 472, 473 (2d Dept. 1977) (relied upon by the lower court to hold the hearing). Actual prejudice is established by the threat to Siegel's due process rights under *Santobello*.

With respect to the substance of the plea agreement, I conclude that on the habeas corpus claim I am bound by the findings of the Appellate Division. Under the habeas corpus statute the factual findings of a state court made after a full and fair hearing are to be accorded great weight. 28 U.S.C. § 2254(d); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, (1973); *Suggs* v. *LaVallee*, 570 F.2d 1092, 1112 (2d Cir.), *cert. denied*, 439 U.S. 915, 99 S.Ct. 290 (1973). Whether a hearing is now required therefore depends on whether the facts determined by the Appellate Division are to be accorded the "presumption of correctness" due to explicit state court findings. 28 U.S.C. § 2254.

Appendix B

The factual findings of a state court are presumed to be correct unless the factual dispute was not resolved in the state court, the fact finding procedure was inadequate to afford a full and fair hearing or did not provide such a hearing, the material facts were not adequately developed at the state court hearing, or the facts were not supported by the record. 28 U.S.C. § 2254(d); *Townsend* v. *Sain*, 372 U.S. 293, 312-13, 83 S.Ct. 745, 757 (1963); *Walker* v. *Wilmot*, 603 F.2d 1038, 1041 (2d Cir. 1979). The presumption of correctness applies to factual determinations whether made by a state trial or appellate court. *Sumner* v. *Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 769 (1981).

The state has failed to establish any grounds to deny the presumptive effect of the state court proceedings. There was a fair and full hearing on the merits, and there is no indication that there is additional specific evidentiary support needed on the issue litigated, the substance of the plea bargain. *Cf. Williams* v. *Blackburn*, 649 F.2d 1019, 1021 (5th Cir. 1981). Both the trial court and the Appellate Division rendered written opinions discussing the facts found at the hearing.

The state's principal contention on this issue is that the findings of the Appellate Division were not "on the merits" since the New York Court of Appeals chose not to consider the facts.[3] Thus it contends there was no deter-

3. The New York Court of Appeals stated:

> We find it unnecessary to attempt to discern the scope and meaning of the statements made during the plea negotiations relative to petitioner's desire to avoid further involvement with the Grand Jury.

55 N.Y.2d at 120-21, 447 N.Y.S.2d at 907.

mination on the merits to which the presumption of correctness under the habeas corpus statute can attach.

Under New York law questions involving mixed issues of law and fact, affirmed at the Appellate Division, are generally not reviewable by the New York Court of Appeals. N.Y.Const.Art.VI, § 3; *People* v. *Wharton*, 46 N.Y.2d 924, 415 N.Y.S.2d 204, *cert.denied*, 444 U.S. 880, 100 S.Ct. 169 (1979); *People* v. *Morales*, 42 N.Y.2d 129, 134-35, 397 N.Y.S. 2d 587, 589-90 (1977), *cert.denied*, 434 U.S. 1018, 98 S.Ct. 739 (1978); *People* v. *Rizzo*, 40 N.Y. 425, 430, 386 N.Y.S.2d 878, 881 (1976). The court's review power is limited when the findings are supported by evidence on the record. *Schubtex, Inc.* v. *Allen Snyder, Inc.*, 49 N.Y.2d 1, 5, 424 N.Y.S.2d 133, 134-35 (1979); *In re Hofbauer*, 47 N.Y.2d 648, 654, 419 N.Y.S.2d 936, 939 (1979).

A review of the record presented to Judge Balbach, establishes that the findings of the state court are supported by the record. The Appellate Division held:

> based upon both our review of the record and the findings of Criminal Term, including its implicit findings with respect to credibility of witnesses, we conclude that when the prosecutor indicated his assent that under the plea bargain petitioner would not be required by his office to "give information", "talk about" or "be questioned about" matters covered in his Grand Jury testimony, he thereby gave his knowing consent that petitioner was not to be called before a Grand Jury by his office to discuss those matters.

83 A.D.2d at 633, 441 N.Y.S.2d at 703. The testimony of the attorneys, evidently credited with significant weight in the proceedings was sufficient to support the determinations

made by the state court. Such assent and agreement in light of the implicit findings of credibility by the state court is sufficient to establish a valid and enforceable plea agreement under the habeas corpus statute. *Cf. Cooper* v. *United States*, 594 F.2d 12, 16-18 (4th Cir. 1979); *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d 786; *In re Doe*, 410 F. Supp. 1163 (E.D.Mich 1976).

Having thus concluded that Siegel's constitutional rights have been violated by the prosecutor's refusal to be bound by the plea bargain, the remaining issue concerns determining the appropriate relief to which Siegel is entitled. The choice among the alternative forms of relief established in *Santobello* is best left to the discretion of the state court. The Second Circuit has recognized that when the state court has chosen the appropriate form of relief "due process does not require the intervention of this court to disturb that discretionary judgment." *Selikoff* v. *Commissioner of Corrections*, 524 F.2d 650, 654 (2d Cir. 1975), *cert.denied*, 425 U.S. 951, 96 S.Ct. 1725 (1976). In *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d 286, the Second Circuit affirmed the district court's determination that specific performance was the only meaningful form of recovery remaining, *id.* at 296-97, rejecting the argument that the state "can disassociate itself from a promise if the prosecutor lacked the authority to make the commitment in question." *Id.* at 295. "[W]hen a defendant pleads guilty because he reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has a right to have those promises fulfilled." *Id.* at 296 (footnote omitted).

In this case the state courts clearly indicated that once the agreement had been established the appropriate remedy was to grant specific performance of the plea agreement

by, in part, quashing the subpoena. 441 N.Y.S.2d at 705. Since the choice among the alternative forms is to be left to the state court, this court will not intervene. *Selikoff* v. *Commissioner of Corrections,* 524 F.2d at 654. Moreover, this appears to be the only reasonably meaningful relief available. Siegel has served one-half of his term of probation and to vacate the plea with the state having the opportunity to retry Siegel would be clearly inappropriate for Siegel would have served half of his term, paid a fine and still be subject to reprosecution for the same offense.

The application of the collateral estoppel doctrine, urged by Siegel fails to establish his Section 1983 claim since the facts of the agreement and its violation must have been necessary to the judgment of the Court of Appeals. *Montana* v. *United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979); 1B Moore's Federal Practice, ¶ 0.443[5] (2d ed. 1980). Such was not the case.

In this case, however, a factual hearing on Siegel's Section 1983 claim is not appropriate for to do so would leave the defendant subject to conflicting and inconsistent factual determinations by this court. More specifically, this court considers itself bound for the purposes of Section 2254 by the determinations of the state court because of the presumption of correctness due state court determinations of fact under Section 2254(d). The interests of justice require that this issue not be litigated further since Siegel has already litigated the matter fully up through the New York courts. Moreover, the press of time indicates that appropriate other relief should be granted.

It is recognized that traditionally the remedy of habeas corpus is addressed to the fact or duration of a petitioner's incarceration. *Preiser* v. *Rodriguez,* 411 U.S. 475, 494,

93 S.Ct. 1827, 1838 (1973). The court, however, has pointed out that the habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release." *Id.* at 487, 93 S.Ct. at 1835, *quoting, Peyton* v. *Rowe,* 391 U.S. 54, 66, 88 S.Ct. 1549, 1556 (1968).

The habeas corpus statute has since 1874 "directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.'" *Preiser* v. *Rodriguez,* 411 U.S. at 487, 93 S.Ct. at 1835. In this case law and justice require that a preliminary injunction issue to restrain the Attorney General from questioning on matters already discussed before the grand jury. Although injunctive relief may be infrequently used under habeas corpus the injunction may properly be used in aid of the writ and the court's jurisdiction. *Cf.* 28 U.S.C. § 1651; *Moore* v. *De Young,* 515 F.2d 437, 447 (3d Cir. 1975). Since consideration of the case under Section 1983 would generally be appropriate, *Allen* v. *McCurry,* 449 U.S. 90, 100-01, 101 S.Ct. 411, 418 (1980), *citing Monroe* v. *Pape,* 365 U.S. 167, 173-74, 81 S.Ct. 473, 476-77 (1961), except for the risk of inconsistent adjudications, the circumstances mandate that preliminary injunctive relief be granted.

Consequently, the preliminary injunction is granted prohibiting the New York Attorney General from questioning Siegel concerning matters discussed in the prior grand jury proceeding.

IT IS SO ORDERED.

DATED: New York, N.Y.
June 15, 1982

/s/ R. Sweet

Robert W. Sweet
U. S. D. J.

APPENDIX C

December 17, 1980 Opinion and Order of N.Y. State Supreme Court, Queens County, Finding and Enforcing Plea Bargain and Modifying Respondent's Grand Jury Subpoena (*Matter of Benjamin S. (Kuriansky)*)

Petitioner John Doe moves to quash a Grand Jury subpoena on the unusual theory that the information sought is barred by virtue of a prior plea bargaining agreement.

The petitioner herein is a salesman, employed by a food company dealing with meat products. In March, 1979 he appeared before a New York County Grand Jury and was questioned by the special prosecutor in connection with payoffs in the nursing home industry. Thereafter petitioner was indicted and charged with three counts of perjury in connection with his Grand Jury testimony. On January 21, 1980 he entered a guilty plea before the Hon. Aloysious Melia to a class B felony on a perjury count and was sentenced to a five year period of probation and fined $2500.

A new subpoena was served on petitioner on July 22, 1980. It was issued from the Long Island branch of the special prosecutor's office and sought information in regards to Queens or Nassau vendors in the health care industry. This subpoena engendered the instant motion. Petitioner maintains that his New York sentence was the result of plea bargaining and part of this agreement was that he would not be asked to cooperate with the office of the special prosecutor in giving information in connection with the meat industry.

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Respondent vehemently denies that silence or lack of cooperation was part of any plea bargaining and opposed the relief sought by petitioner.

To resolve this motion, the court must determine:

(1) the nature of the plea bargaining agreement—whether petitioner's silence was an element in it; and

(2) the result of any such agreement. How would such an understanding affect a subpoena?

I

Nature of the Plea Negotiations

An extended hearing was held and all involved attorneys testified.

Petitioner's attorneys were Eleanor Jackson Peel [*sic, passim*] and Harold Cammer. Ms. Peel has been practicing law for over 30 years; Mr. Cammer has almost half a century before the bar to his credit. Both attorneys are well known in their field, competent and highly respected, with extensive practices in New York and other states.

Attorney Peel testified that she and co-counsel Cammer represented petitioner at his earlier trial in which he was charged with three counts of perjury. During the course of these proceedings she had occasion to discuss the indictment with the special prosecutor who handled the matter, Mr. James Daw. On November 21, 1979 they were all present in the courtroom as Justice Melia ruled on an omnibus motion. After the ruling, all three counsel discussed the case in the judge's chambers. Justice Melia felt that

this was an appropriate matter for disposition and inquired whether the parties had discussed the possibility of a plea. The attorneys indicated that they had not and the judge suggested that they consider this matter at their next meeting.

On November 30 they returned to court and Mr. Daw indicated that his office might consider a plea of guilty to one count of perjury as a felony and would request a years imprisonment or a similar jail sentence. Opposing counsel rejected this offer as unacceptable and felt that under the circumstances of the case a non-jail misdemeanor was more appropriate. Attorney Peel testified that during this discussion Mr. Cammer (who had represented petitioner at the Grand Jury level), stated that petitioner would not cooperate in any plea by giving information or talking about what he knew in the meat industry since he had been employed in that field for 18 years and it would be impossible for him to work with people if he were to compromise himself.

These statements were made before Judge Melia and he asked the special prosecutor to see what could be done with respect to these counter-offers. The matter was put off until January 6th.

On this date, all parties returned to court and Mr. Daw indicated that his office might accept petitioner's proposals except that he would not agree to a misdemeanor plea but would only accept a felony. Judge Melia then stated that a pre-pleading report would be necessary before any further discussion of possible pleas might be considered. The case was marked for January 21st.

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On this date, Ms. Peel testified that she arrived at the court a few minutes before calendar call and met the deputy attorney general in the hall. Both of them discussed the case. Among the general topics of conversation was a discussion of the difficulty of obtaining cooperation from persons involved in the service industries in cases of this nature.

The case was called and both sides studied the probation reports. Mr. Daw allegedly stated that it was a shame that petitioner had not chosen to cooperate or give his office information. Later, Judge Melia indicated that he had read the probation report, found it favorable and that he would consider imposing probation and a fine in this case.

Co-counsel Harold Cammer next testified. He was present on November 30 when Judge Melia raised the possibility of the case being resolved by a plea. At that time the special prosecutor said only a felony plea would suffice. The counsel stated that Ms. Peel objected to a jail sentence as being unjust and she went into the background of petitioner pointing out his age, his steady employment and a favorable war record as well as his lack of culpability in the instant case. Co-counsel testified that whatever the plea it would have to be made with the understanding that petitioner would not give any information about the meat industry where he worked since he would not be able to continue working or secure employment from friends in the trade. In addition, since he worked as a commission salesman, he would not be able to earn a living if he gave incriminating information.

Neither Judge Melia or attorney Daw responded to this statement or commented in any way. The only statement

the special prosecutor made was that he would have to take the matter up with his office.

On December 6, 1979 the special prosecutor stated that the petitioner's proposals were satisfactory except that the plea would have to be to a felony.

Thereafter on January 21, 1980 the witness stated that he returned to the courtroom and discussed the case informally with Mr. Daw in the hall and once again advised him that his client was deeply concerned over any possibility that he might have to give further information. The special prosecutor stated that he understood.

Attorney James Daw, representing the state, next testified. He was admitted to the bar in 1975 and was assigned petitioner's case in 1979. Attorney Daw handled the matter after the indictment was voted and he did not handle it at the Grand Jury level. To the best of his recollection there were two or three discussions dealing with a plea. These talks took place between November, 1979 and January, 1980. The special prosecutor stated that on behalf of his office he could not accept the plea unless it involved a class E felony with a recommendation of incarceration. Defendant's attorney objected to any felony plea and proposed a class A misdemeanor with no imprisonment. Mr. Daw testified in this regard (p. 139, 140, hearing minutes 8/28/80).

> "I told Mrs. Peel at the time that the only way such a plea would be acceptable would be if the defendant agreed that he would cooperate with the office in various investigations that we were conducting involving information which had come to our attention, and, indeed, had been the subject, I suppose, of his Grand Jury appearance."

"Mrs. Peel told me that he couldn't cooperate with us. That if he did so it would jeopardize his position in the meat industry. He was employed as a meat salesman. Given his age it would be extremely difficult for him to find employment were that to happen".

"So the position I took was that the defendant would have to plead to an E and he did so".

"Q—This is an E with no cooperation?
A—That is correct."

Mr. Daw stated that the only plea bargain agreement that he entered into was that if defendant entered a plea of guilty to a class E felony, he would not object to probation and a fine. There were no other promises that he made in respect to this plea bargaining. He further stated that he believed that he mentioned the possibility of petitioner appearing before an additional Grand Jury regardless of what plea he took.

The plea minutes were then entered into evidence. There is no mention of cooperation or lack of same in the record.

A pertinent section shows the following: (p. 3, plea and sentence minutes, 1/21/80).

The Court: Now, I have told Mrs. Peel and Mr. Cammer that if you entered this plea of guilty that I would sentence you to probation for five years and in addition impose a fine or in lieu of payment of the fine a prison sentence. Do you understand that?

The Defendant: Yes, your honor.

The Clerk (p. 7) * * * you are now being arraigned for sentence under indictment * * * of 1979 upon your plea of guilty to the crime of perjury in the second degree under the first count of that indictment to cover the indictment. You, your counsel or both of you may

address the court after the assistant district attorney has addressed the court and prior to sentence. Does the assistant wish to make a statement before sentence?

Mr. Daw: No, the People will rely on the conference that was had at the Bench.

The Court: Thank you, Mr. Daw. Mrs. Peel?

Mrs. Peel: Your Honor, I believe we have fully discussed the matter. I believe your Honor fully understands the facts. I have read the probation report and your Honor has read it and I believe the position of the defendant is clearly set forth there as well as the position of the prosecution and we rely on the record.

The People concluded their hearing by presenting attorney John Bevilacqua who issued the present disputed subpoena. Mr. Bevilacqua stated that he was a special assistant attorney general for the State of New York assigned to working under Charles J. Hynes, deputy attorney general in the hospital division of the Long Island regional office. He testified that he had conducted his own investigation and based on this and information received in the Long Island office he had decided to subpoena the petitioner in this case. The state attorney indicated that he had not been in touch with the New York City prosecutor and that his investigation was distinct from that of any previous one.

II

The Applicable Law

It is now clear that plea bargain is a valid legal process and one which serves the interests of justice (*Santobello* v

New York, 404 US 257; *People* v *Selikoff*, 35 NY2d 227). The underlying rule is that when a defendant has been induced to plead guilty in reliance on a promised sentence and all bargain conditions are performed, the sentence promised must be fulfilled or the defendant granted the right to withdraw his plea.

As regards the plea bargaining process, a fundamental rule is that all agreements should be placed squarely on the record (*People* v *Selikoff*, *supra*, 243-244). A full record is vital

> "so that defendant will understand that he can rely on what is stated on the record, within the limitations stated and cannot under any but the most unusual circumstances rely on anything not stated on the record no matter what discussion there has been" (*People* v *McConnell*, 49 NY2d 340, 346).

Once a promise is placed on the record the court will then examine the minutes of plea and sentence. If the record establishes that the plea is so unequivocal that it refutes the contention of an "off-the-record promise" then relief cannot be granted (*People* v *Selikoff*, *supra*). Nor will the court act when defendant's claims are patently incredible and flatly contradicted by this court record (*People* v *Davidson*, 35 NY2d 227, 244; *People* v *Sominara*, 58 AD2d 841).

Most of these off-the-record promises start out as discussions between the parties and are merely exploratory in nature and are not meant to be binding on either side. However, some of these discussions do take the form of representations. If these representations are substantial enough to cause a defendant to actually accept a plea and

the prosecutor is aware of this, then they well may be considered legally binding agreements. If so, they fall under the *Santebello* [*sic*] rule. If a defendant's rights have been found to be violated, two remedies have been utilized; (1) specific performance of the plea agreement (*Santebello* [*sic*] v *New York* (*supra*); withdrawal of the guilty plea (*People* v *Selikoff, supra*). Whatever the remedy, its determination will be made by the court.

In the case at bar the sentencing and plea minutes make no reference to any promise on the part of the prosecutor that he would respect the petitioner's right to silence on matters revealed by the Grand Jury investigation or that the plea in this case was based on a theory of non-cooperation. There were references to prior conferences and previous discussions but nothing which would support petitioner's claim. However, the hearing did disclose that petitioner was involved in a non-violent crime and gave false testimony in regard to his business dealings. On several occasions petitioner's attorneys stated to the special prosecutor that their client was deeply concerned about the possibility of future New York Grand Jury appearances. The state was aware that the petitioner in this case would not cooperate for fear of losing his business as a salesman. Worthy or unworthy as this motive may be, it was definitely expressed in this case. Further, the record shows that the petitioner would not cooperate by giving any information as regards his business dealings or accept a misdemeanor plea based on cooperation.

An analysis of the evidence shows no definite promise by the state regarding Grand Jury appearances. Yet the record does establish that the issue was a central theme in

all negotiations and discussed frequently. Certainly the special prosecutor is not under any duty to resolve every issue raised during plea discussions. Some matters are minor or beyond the normal scope of a sentencing court. Thus a state attorney may elect to remain silent or take no position on matters which he feels are immaterial to the proceedings (cf. *People* v *Jones*, 37 Misc2d 931). However once the prosecutor does enter into matters raised in plea negotiations and becomes aware that a defendant considers his answers to be representations and relies on such answers, then the state attorney is under an obligation to be precise in his representations. If the state perceives that there is confusion about a specific matter vital to a defendant it is under a further duty to take reasonable steps to end that confusion. In the case at bar when the possibility of future Grand Jury appearances was raised the deputy attorney general gave equivocal answers which logically would have the effect of letting petitioner believe that he would have no grounds for worry in this respect.

In addition, petitioner was represented by two experienced attorneys and it was their understanding also that the off-the-record representation was to the effect that their client would not be obliged to give further information before a New York Grand Jury. It is also clear that if the special prosecutor had expressed any doubts on the record as to whether or not the petitioner might have to appear before a Grand Jury, the plea bargaining session would have been different.

This being the case, the court believes that the petitioner did enter into a plea bargaining agreement regarding his non-appearance before any further New York Grand Jury.

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III

The Relief To Be Granted

The finding that an agreement was made concerning a second New York Grand Jury appearance does not resolve the problem. For the state argues that if such a promise was made it is limited exclusively to the matters discussed in the earlier New York County hearing and cannot bind future Grand Juries in another county. Without resolving the jurisdictional implications of such a promise, it is the general rule that the representations of one state agency do not necessarily bind another state agency. Yet such commitments * * * "should not be lightly disregarded. While the representation may not bind other State agencies, they should not be ignored either" (*Chaipis* v *State Liquor Auth.*, 44 NY2d 57, 62). In any event, we are not dealing with different state agencies in this case but only with one, the special prosecutor's office in charge of nursing home investigations. As we pointed out in *Santobello* v *New York*, *supra*, p. 499 "The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member" (*supra*, 263).

The promise in this case was that the petitioner would not be questioned a second time on matters already asked by New York Grand Jury. The normal remedy in plea bargaining cases is to grant specific performance or set aside the plea. In cases where neither relief is appropriate the courts have not hesitated in proving a third remedy by giving the defendant the legal equivalent of the prosecutor's promise in order to fulfill the ends of justice (*Palermo* v *Warden, Green Haven State Prison*, 545 F2d 286). In

one novel case, the court was faced with a situation which involved a promise where a district attorney guaranteed immunity if a witness would cooperate. The witness did so and later was indicted. The People argued that since the witness was never formally called before a Grand Jury they could not grant immunity. The court resolved the dilemma by dismissing the indictment and granting the defendant the practical benefit of his earlier promise (*People* v *Caruso*, 100 Misc2d 601).

Another case similar in some respects to the present one, concerns a petitioner in a federal action who surrendered drugs to federal agents in return for an expressed promise not to ask any questions about the contraband. Later he was called before a Grand Jury and granted immunity from prosecution. He argued that his original bargain was freedom from questioning, nothing else. A federal appellate court agreed with him and stated that the original promise was immunity from testimony and not simply immunity from prosecution (*Matter of Doe*, 410 F.Supp. 1163).

In the instant case the application is to quash or modify a Grand Jury subpoena which is governed by CPLR, section 2304. The state argues that the petitioner has advanced none of the traditional grounds essential to avoid obedience. There is no claim that the subpoena was issued in bad faith, over-broad or barred by constitutional privilege.

While this may be so, it must be kept in mind that the special prosecutor acts as the legal advisor of the Grand Jury (CPL, § 190.25) and has the duty of determining both the competency of prospective witnesses and the admissibility of their evidence (CPL, § 190.30 [6]; *People* v *Di*

Falco, 44 NY2d 482, 487). If the special prosecutor is aware that a promise has been made at a plea bargaining session to restrict the use of potential evidence, fundamental fairness demands that this promise be kept. As was pointed out in *People* v *Savvides*, 1 NY2d 554, 555, "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach".

Since there was *no* promise in this case that petitioner would never have to testify before a Grand Jury, that prohibition against all questioning set forth in *Matter of Doe* is not warranted. Instead, this court will issue an order restricting Grand Jury testimony as contemplated by the plea bargaining agreement.

Consequently the subpoena issued by the special prosecutor is modified to the extent that petitioner may be questioned about all relevant matters except those facts which were discussed during his prior appearance before the New York County Grand Jury on March 13, 1979. The application is denied in all other respects.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant.

s/

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George J. Balbach, J.S.C.

APPENDIX D

July 27, 1981 Decision of Appellate Division Affirming N.Y. State Supreme Court, Queens County (*Matter of Benjamin S. (Kuriansky)*, 83 A.D.2d 630, 441 N.Y.S.2d 698 (2d Dept. 1981))

MEMORANDUM BY THE COURT

Appeal by the Deputy Attorney-General for Medicaid Fraud Control, from so much of an order of the Supreme Court, Queens County, dated December 17, 1980, as, upon petitioner's motion to quash or modify a subpoena requiring his attendance before a Queens County Grand Jury, modified the subpoena so as to preclude the questioning of petitioner about facts discussed during his appearance before a New York County Grand Jury on March 13, 1979.

Order affirmed insofar as appealed from, without costs or disbursements.

On March 13, 1979 petitioner, a wholesale meat salesman, testified before a New York County Grand Jury which was conducting an investigation into alleged criminal activities in the health care industry in New York County. In his testimony petitioner denied any knowledge of persons in the meat industry having paid kickbacks to persons in the nursing home industry. Petitioner also denied that he had ever paid or discussed kickbacks. As a result of his testimony, he was indicted on three counts of perjury in the first degree, a class D felony. The prosecution was conducted by a Special Deputy Attorney-General assigned to the New York City regional office of the Hospital Division of the Deputy Attorney-General for Medicaid Fraud Control.

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Petitioner pleaded not guilty. Thereafter, he made several motions, including motions to dismiss the indictment in whole or in part. The Trial Judge denied petitioner's motions to dismiss, although he did remark that one of them involved "a very gray area". He did, however, grant petitioner's motion to suppress one of the tape recordings which was to be used as evidence of his perjury. According to one of petitioner's counsel, after the Trial Judge had made these rulings, he invited counsel into his chambers, indicated that he thought that the case was an "appropriate case for disposition", and asked counsel to return in a week with some sort of proposal with regard to disposition of the case. As a result of the ensuing negotiations triggered by the Trial Judge's request, petitioner pleaded guilty two months later to one count of perjury in the second degree, a class E felony, in full satisfaction of the indictment. He was sentenced to five years' probation and a fine of $2,500. This sentence was imposed in accordance with the Judge's promise that if petitioner pleaded guilty to a class E felony, he would receive probation and a fine. The Judge apparently arrived at this sentence upon his review of a prepleading report prepared by the probation department and without reference to any agreement by the parties concerning what they perceived to be an appropriate sentence. Before sentencing petitioner, the court noted that he was 61 years of age, had never had any prior conflict with the law, had a "fine war record", and had led "what has appeared to be an exemplary life up to this point and time".

About six months after petitioner had pleaded guilty, a Special Assistant Attorney-General assigned to the Long

Island Regional Office of the Hospital Division, issued a subpoena to petitioner directing him to appear before a Queens County Grand Jury. According to the Special Assistant, that subpoena was issued because the Queens County Grand Jury had received information "different than the investigation in Manhattan" which had "grow[n] out of a separate matter". The Special Assistant did not recall discussing the issuance of this subpoena with any member of the New York City Regional Office. The Special Deputy Attorney-General who had prosecuted petitioner first learned of the subpoena from petitioner's counsel, after it had been issued.

Petitioner moved to quash or modify the subpoena so as to limit the subject matter of his testimony to events that occurred in Queens County after the date of his testimony before the New York County Grand Jury.[1] The basis for the time limitation urged by petitioner was an alleged agreement that he had entered into with the Special Prosecutor's Office that, in return for his pleading guilty to a felony, he would not be required to give any information concerning matters which were the subject of inquiry during his appearance before the New York County Grand Jury. After conducting an evidentiary hearing (cf. *People* v. *Seminara*, 58 A.D.2d 841, 396 N.Y.S.2d 472), the hearing court concluded that petitioner had indeed entered into such an agreement and that he was entitled to have it enforced to the extent of having the subpoena modified to limit the subject matter of petitioner's testimony to his being "ques-

1. Petitioner's motion was made in Queens County. A motion by the Deputy Attorney-General to change venue to New York County was denied and later withdrawn.

tioned about all relevant matters except those facts which were discussed during his prior appearance before the New York Grand Jury". This appeal by the Deputy Attorney-General followed.

A defendant may not plead guilty to a lesser included offense of an offense charged in an indictment without the consent of the People (CPL 220.10). Accordingly, "[a] District Attorney may dictate the terms under which he will agree to consent to accept a guilty plea [to a lesser offense] and * * * the withholding of such consent * * * renders the court without authority to accept a plea to anything less than the entire indictment" (*Matter of Gribetz v. Edelstein*, 66 A.D.2d 788, 410 N.Y.S.2d 873). Moreover, "the statutory requirement of consent by the People to the acceptance of a reduced plea can hardly be obtained by estoppel against the District Attorney on the basis of his alleged negligence or indifference" (*Matter of Blumberg v. Lennon*, 44 A.D.2d 769, 354 N.Y.S.2d 261). It follows, then, that, at least under all but the most unusual circumstances, a prosecutor may not be held to any aspect of a plea bargain as to which he has not, in fact, given his consent. However, the law does not permit a prosecutor who consented to an aspect of a plea bargain to avoid its enforcement merely because, as here, the relevant portion of the plea bargain was neither in writing nor recited on the record during the plea proceedings, at least where the "off-the-record" promise is neither contradicted by the record of the plea proceedings nor legally impossible for the prosecutor to perform (see *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427; *People v. Seminara, supra*; cf. *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d

623, 318 N.E.2d 784, cert. den. 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d822; *People v. Campbell,* 35 N.Y.2d 227, 241-242, 360 N.Y.S.2d 623, 318 N.E.2d 784). Concluding that the Deputy Attorney-General, through the Special Deputy Attorney-General who prosecuted petitioner's case, did enter into a plea agreement under which, among other things, he agreed not to elicit further Grand Jury testimony from petitioner concerning matters discussed in his Grand Jury testimony on March 13, 1979, that such an agreement is neither contradicted by the record of the plea proceedings nor legally impossible for the Deputy Attorney-General to perform, and that there is no other reason for denying specific performance of the plea agreement, we affirm the order of Criminal Term insofar as appealed from.

Petitioner's two defense counsel[2] testified at the evidentiary hearing, as did the Special Deputy Attorney-General who prosecuted petitioner. In their testimony, these witnesses all agreed that, under the plea bargain, the People consented to petitioner pleading guilty to a class E felony without his having to provide any information about illegal activities as a condition precedent thereto. However, the prosecutor testified that this was the full extent of the agreement. Indeed, he testified that he had specifically told one of petitioner's counsel that the plea bargain did not prevent petitioner's being recalled to testify for a second time before the Grand Jury. In contrast, petitioner's counsel both testified that the specific topics of future Grand Jury testimony by petitioner had never been

2. The hearing court observed that petitioner's defense counsel were "well-known in their field, competent and highly respected" and had been practicing law for more than 30 years and almost 50 years, respectively.

discussed with the prosecutor. According to the testimony of one of them, which was supported by the testimony of petitioner's other attorney, the plea bargain provided that, as a result of petitioner's having agreed to plead to a felony, he would not be required to "give information", "talk about" or "be questioned about" the matters covered in his perjury indictment. To petitioner's counsel this bargain barred any future Grand Jury testimony by petitioner concerning such matters. According to them, their client's primary concern throughout the plea negotiations have been to insure that he would be shielded from having to give any information, whether before a Grand Jury or otherwise, concerning his dealings with customers and others in the health care industry. This concern arose from petitioner's fear that if it ever became known that he had given such information he would be unable to continue to work as a commission meat salesman, his sole occupation for at least the preceding 18 years. Thus, petitioner's counsel portrayed the plea bargain, in essence, as one in which petitioner, who had no prior criminal record, and a good reputation, agreed to forego a possibly successful defense to the prosecution and to accept the ignominy of a felony conviction in return for being permitted to avoid giving information by which he would severely jeopardize his livelihood. In this regard, there was testimony, corroborated for the most part by the prosecutor, that the prosecutor had rejected petitioner's offer to plead guilty to a misdemeanor conditioned upon his not giving any information to the prosecutor's office, insisting upon a plea

to a felony in that event. To petitioner's counsel the essential aspect of the plea bargain, that petitioner be shielded from, *inter alia*, giving future Grand Jury testimony with respect to the matters covered in his prior testimony, was so well understood by counsel and the court that there was no need to spell it out during the plea proceedings.

Based on the evidence adduced at the hearing, Criminal Term reached the following conclusions concerning the nature of the plea bargain which had been made:

> "An analysis of the evidence shows no definite promise by the state regarding Grand Jury appearances. Yet the record does establish that the issue was a central theme in all negotiations and discussed frequently. Certainly the special prosecutor is not under any duty to resolve every issue raised during plea discussions. Some matters are minor or beyond the normal scope of a sentencing court. Thus a state attorney may elect to remain silent or take no position on matters which he feels are immaterial to the proceedings (cf. *People* v. *Jones*, 87 Misc.2d 931[387 N.Y.S.2d 779]). However, once the prosecutor does enter into matters raised in plea negotiations and becomes aware that a defendant considers his answers to be representations and relies on such answers, then the state attorney is under an obligation to be precise in his representations. If the state perceives that there is confusion about a specific matter vital to a defendant it is under a further duty to take reasonable steps to end that confusion. In the case at bar when the possibility of future Grand Jury appearances was raised the deputy attorney general gave equivocal answers which logically would have the effect of letting petitioner believe that he would have no grounds for worry in this respect.

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> "In addition, petitioner was represented by two experienced attorneys and it was their understanding also that the off-the-record representation was to the effect that their client would not be obliged to give further information before a New York Grand Jury. It is also clear that if the special prosecutor had expressed any doubts on the record as to whether or not the petitioner might have to appear before a Grand Jury, the plea bargaining session would have been different.
>
> "This being the case, the court believes that the petitioner did enter into a plea bargaining agreement regarding his non-appearance before any further New York Grand Jury."

Criminal Term then determined that "specific performance" of the plea bargain, to the extent indicated, was the appropriate remedy for the breach of that agreement.

While we cannot agree with all of the findings and conclusions of Criminal Term, we reach the same result that it did.

Insofar as Criminal Term found that the specific issue of future Grand Jury appearances had been raised in the plea negotiations, such a finding has no support in the record and cannot be affirmed. As indicated, petitioner's own counsel testified that there had been no specific discussion of future Grand Jury appearances. Moreover, we disagree with Criminal Term to the extent that it concluded that, as a matter of law, under the circumstances of this case, the prosecutor might be held to an aspect of the plea bargain to which he did not actually consent because he made imprecise or equivocal statements during the plea negotiations. The mere fact that a defnse attorney had been left with an "impression" that a particular promise

had been made is not sufficient to give rise to an enforceable promise (see *People v. Lazore*, 59 A.D.2d 635, 398 N.Y.S.2d 189). In other words, as a general matter, short of a conclusion that a prosecutor knowingly consented to an aspect of a plea bargain, this court will not hold him to it (see *Matter of Gribetz v. Edelstein*, 66 A.D.2d 788, 410 N.Y.S.2d 873, *supra; Matter of Blumberg v. Lennon*, 44 A.D.2d 769, 354 N.Y.S.2d 262, *supra*). However, based upon our review of the record and the findings of Criminal Term, including its implicit findings with respect to credibility of witnesses, we conclude that when the prosecutor indicated his assent that under the plea bargain petitioner would not be required by his office to "give information", "talk about" or "be questioned about" matters covered in his Grand Jury testimony, he thereby gave his knowing consent that petitioner was not to be called before a Grand Jury by his office to discuss those matters.

In reaching this conclusion, we must emphasize that the promise alleged by petitioner is not contradicted by the record of the plea proceedings. It it were, then the promise could not be recognized for a defendant will not be heard to contend that an off-the-record promise was made to him to induce his guilty plea "when the minutes of the plea are unequivocal and refute any contention of an off-the-record promise" (*People v. Frederick*, 45 N.Y.2d 520, 526, 410 N.Y.S.2d 555, 382 N.E.2d 1332). However, the oft-posed question to a defendant whether any promises have been made to him other than those set forth on the record is conspicuously absent from the minutes of the plea proceedings in petitioner's case. Nor do those minutes or the sentence minutes contain anything else which

refutes or contradicts petitioner's contention. Since petitioner's reliance upon an off-the-record promise may not be rejected on the ground that such a promise is at variance with the record (see *People v. Seminara*, 58 A.D.2d 841, 396 N.Y.S.2d 472, *supra*), the issue whether the prosecutor consented to a plea bargain which he understood to bar future Grand Jury testimony by petitioner with respect to matters discussed in his prior Grand Jury testimony may properly be considered.

The prosecutor testified that he stated to one of petitioner's counsel that the plea bargain did not prevent petitioner from being called to testify before a Grand Jury. Petitioner's counsel testified that no such statement had been made. If the prosecutor's testimony was credited, then the order would have to be reversed insofar as appealed from. However, in reaching the determination that it did, Criminal Term necessarily concluded that the testimony of petitioner's counsel was the more credible in this respect. Since Criminal Term had the advantage of seeing and hearing these witnesses and the testimony of neither of them was incredible as a matter of law, we defer to this factual conclusion by Criminal Term (see *Amend v. Hurley*, 293 N.Y. 587, 594, 59 N.E.2d 416; *People v. Newson*, 68 A.D.2d 377, 386-387, 417 N.Y.S.2d 264; *Rametta v. Kazlo*, 68 A.D.2d 579, 418 N.Y.S.2d 113; *Barnet v. Cannizzaro*, 3 A.D.2d 745, 747, 160 N.Y.S.2d 329).

Our review of the remaining evidence in the record, accomplished with Criminal Term's determination of credibility in mind, convinces us that the result reached by the court was proper. Concededly, there was no evidence that

there had been any specific statement by the prosecutor that the plea bargain would prohibit petitioner's being called to give Grand Jury testimony concerning the matters he had already discussed before the Grand Jury. However, there was evidence that the prosecutor had indicated his assent to petitioner's counsel's statements that, under the plea bargain, petitioner would not be required to "give information", "talk about" or "be questioned about" those matters. Any doubt concerning the meaning of these terms is resolved to our satisfaction upon reference to the admitted failure by the prosecutor, or anyone else in the regional office in which he was employed, to make any effort to call petitioner before the Grand Jury following entry of his guilty plea despite ample opportunity to do so. In an affirmation made in opposition to petitioner's omnibus motion, over two months before petitioner pleaded guilty, the prosecutor had stated that "[Petitioner's] truthful immunized testimony could have provided the Grand Jury with valuable insights into crime in the health care field". Moreover, at the plea proceedings, the prosecutor heard petitioner admit that he had given perjured testimony during his Grand Jury appearances. Since the prosecutor was of the view that petitioner could provide valuable testimony to the Grand Jury and knew that the testimony that petitioner had previously given was false, he had strong reason to recall petitioner before the Grand Jury. The prosecutor's failure to do so is powerful evidence that he understood the plea bargain to prevent him from doing so.

Our conclusion concerning the agreed upon meaning of the aspect of the plea bargain at issue is also buttressed by

other uncontested facts reflected in the record. For example, it is noteworthy that at no time did the Judge who accepted petitioner's plea and sentenced him to probation indicate that either acceptance of the plea or imposition of a probationary term would be conditioned upon petitioner's giving truthful testimony before the Grand Jury. Moreover, under the objective circumstances of this case, we are of the view that it is unlikely that the prosecutor believed that petitioner's counsel were entering into a plea bargain under which the sole benefit to be provided to petitioner by the prosecutor's office was to permit him to plead guilty to a felony that was of one degree less severity than the crimes charged in the indictment without having to provide information as a condition precedent thereto.

We reject the contention of the Deputy Attorney-General that, even if there was a promise which purported to shield petitioner from further Grand Jury testimony, such a promise may not be enforced because it is impossible for the Deputy Attorney-General to perform it without impermissibly infringing upon the right of the Grand Jury to gather evidence. As the Deputy Attorney-General contends, where a prosecutor promises that which he cannot legally perform, a defendant may not, as a matter of law, rely on that promise or be entitled to its enforcement (*People v. Selikoff*, 35 N.Y.2d 227, 241, 360 N.Y.S.2d 623, 318 N.E.2d 784, cert. den. 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822, *supra*; see *Matter of Chaipis v. State Liq. Auth.*, 44 N.Y.2d 57, 404 N.Y.S.2d 76, 375 N.E.2d 32; but see *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2nd Cir.)). However, as this court and the petitioner interpret the promise in question, we believe that there is

no legal bar to the Deputy Attorney-General's performance of it.[3]

As stated in *People v. DiFalco*, 44 N.Y.2d 482, 486-487, 406 N.Y.S.2d 279, 377 N.E.2d 732:

> "During the actual proceedings, the legal advisor of the Grand Jury is the District Attorney and legal advice from any other source is improper (CPL 190.25, subd. 6; see *Matter of Hynes v. Moskowitz*, 44 N.Y.2d 383 [406 N.Y.S.2d 1, 377 N.E.2d 446]). The District Attorney determines the competency of witnesses to testify (CPL 190.30, subd. 5), and must instruct the jury on the legal significance of the evidence (CPL 190.30, subd. 6). He, in effect, determines what witnesses to present to that body and who should be excluded. These duties and powers, bestowed upon the District Attorney by law, vest that official with substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion."

We note that a district attorney is authorized to seek to prohibit the Grand Jury from calling a witness where to do so would not be "in the public interest" (CPL 190.50, subd. 3). However, we need not explore that issue because in this case, according to petitioner, his "limited position * * * is merely that prosecutor is barred by the plea agreement from questioning [petitioner] again as to the identical matters already covered in [his] prior grand jury ap-

3. We observe that a promise of this nature made by a prosecutor in the New York regional office of the Special Prosecutor is binding upon the Special Prosecutor's office as a whole, including the members of the Long Island regional office. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or had done" (*Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427).

pearance". CPL 190.50 sets forth the exclusive circumstances under which a person may be called as a witness in a Grand Jury proceeding. Pursuant to subdivision 2 thereof, the People "may", but are not required to, call any person believed by the district attorney to possess relevant information or knowledge. A prosecutor, in performance of a valid plea bargain, may decline to call before the Grand Jury a witness whom he believes possesses relevant information or knowledge. Thus, we fail to perceive any legal bar to his agreeing not to ask certain questions in return for a defendant's pleading guilty.

The Deputy Attorney-General contends finally that Criminal Term erred in granting petitioner "specific performance" of the plea agreement. He argues that where, as here, a defendant has given up only his right to proceed to trial on the indictment, the "normal" remedy upon a demonstrated breach of a plea agreement is to merely afford the defendant an opportunity to withdraw his guilty plea. We disagree. It has been said that "both *Selikoff* and *Frederick* establish that in most instances when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored, but * * * the choice rests in the discretion of the sentencing court" (*People v. McConnell*, 49 N.Y.2d 340, 346, 425 N.Y.S2d 794, 402 N.E.2d 133). However, in *Selikoff*, *Frederick* and *McConnell*, the promise was made, or allegedly made, by the sentencing court. Here a legally enforceable, nondiscretionary promise was made by a prosecutor. Where such a promise has been breached, at least as a general matter,

the minimum relief to which a defendant who has pleaded guilty in reliance upon that promise is entitled is its enforcement. Thus, it was said in *Santobello v. New York,* 404 U.S. 257, 262, 263, 92 S.Ct. 495, 498, 499, 30 L.E.2d 427 *supra*), where the defendant had apparently not been prejudiced by the prosecutor's breach of the plea agreement:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.
>
> * * *
>
> "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require *only* that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i. e., the opportunity to withdraw his plea of guilty" (emphasis supplied).

Finding no reason in this case not to have the prosecutor's promise enforced, we affirm the order of Criminal Term insofar as appealed from.

APPENDIX E

February 18, 1982 Opinion and Order of New York Court of Appeals Reversing Appellate Division (*Matter of Benjamin S. (Kuriansky)*, 55 N.Y.2d 116, 447 N.Y.S.2d 905, 432 N.E.2d 777 (1982))

OPINION OF THE COURT

GABRIELLI, Judge.

Petitioner moved to quash or modify a Grand Jury subpoena issued by a Queens County Grand Jury, on the basis of a promise allegedly made to him by a Special Assistant Attorney-General as part of a plea bargaining agreement. Supreme Court and the Appellate Division both held that the plea bargaining promise should be enforced, each basing the result on differing reasoning. Because the alleged promise was not made a part of the record in the prior criminal proceeding, we reverse.

In March of 1979, petitioner was subpoenaed to appear before a New York County Grand Jury and was questioned about the existence of kickbacks and other illegal rebates in the health-care industry. Petitioner's responses to this questioning led to his indictment for three counts of perjury in the first degree. During plea negotiations, petitioner's desire to avoid being required to give further information regarding the events covered by his Grand Jury testimony was expressed several times by his two attorneys. Whatever understanding may have been reached between petitioner's attorneys and the prosecutor in this regard, however, it clearly was not made a part of the record. Neither is the existence of such an agreement flatly contradicted on the record, either by virtue of an inconsistent agreement

or by a statement elicited from petitioner that no other promises had been made to induce his plea.

Approximately six months after his guilty plea, petitioner was served with a grand jury subpoena commanding his appearance before a Queens County Grand Jury, which was investigating corruption in the hospital industry. This subpoena, the subject of the present appeal, was issued in connection with an investigation being prosecuted by another bureau of the special prosecutor's office which had previously subpoenaed petitioner in March of 1979. After unsuccessful attempts to have the claimed plea bargaining agreement honored, petitioner made a motion to quash or modify the subpoena. Supreme Court, Criminal Term, found that the prosecutor, by his equivocal responses whenever the subject was brought up, had led petitioner to believe that he had no reason to worry about future Grand Jury appearances. Notwithstanding the court's belief that no definite promise had been made regarding future Grand Jury testimony, it enforced petitioner's expectation by modifying the subpoena to the extent of precluding questioning of petitioner about matters which had been discussed during his prior appearance before the New York County Grand Jury.

The Appellate Division affirmed, but on a different analysis. That court noted that a prosecutor may not be held to an aspect of a plea bargain to which he did not consent simply because he made imprecise or equivocal statements during plea negotiations. The Appellate Division found, however, that by indicating his assent that petitioner would not be required to give further information about matters covered in his Grand Jury testimony, the prose-

cutor knowingly consented to an agreement that petitioner would not be called before a Grand Jury by his office to discuss those matters.

We find it unnecessary to attempt to discern the scope and meaning of the statements made during the plea negotiations relative to petitioner's desire to avoid further involvement with the Grand Jury. Inasmuch as a record had been made of the terms of the plea agreement in the prior criminal proceeding, and the promise petitioner now claims was made is nowhere mentioned in that record, the claimed off-the-record promise is unenforceable. Thus, the order of the Appellate Division, 83 A.D.2d 630, 441 N.Y.S.2d 698, should be reversed.

It is a settled rule of law in this State that off-the-record promises made in the plea bargaining process will not be recognized where they are flatly contradicted by the record, either by the existence of some on-the-record promise whose terms are inconsistent with those later urged or by the placement on the record of a statement by the pleading defendant that no other promises have been made to induce his guilty plea (*People v. Frederick*, 45 N.Y.2d 520, 410 N.Y.S.2d 555, 382 N.E.2d 1332; *People v. Selikoff*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784, cert. den. 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822; *People v. Da Forno*, 53 N.Y.2d 1006, 442 N.Y.S.2d 476, 425 N.E.2d 864). We have repeatedly emphasized the necessity of placing all promises on the record, in order to assure the continued validity and usefulness of the plea bargaining process in our criminal justice system (*People v. Frederick*, 45 N.Y.2d 520, 526, 410 N.Y.S.2d 555, 382 N.E.2d 1332, *supra; People v. Selikoff*, 35 N.Y.2d 227, 244, 360 N.Y.S.2d 623, 318 N.E.2d 784, *supra;*

see, also, *People v. McConnell*, 49 N.Y.2d 340, 346, 425 N.Y.S. 2d 794, 402 N.E.2d 133).

The distinguishing factor in the present case, and one which the Appellate Division found to be dispositive on this issue, is that the promise now urged by petitioner is not expressly contradicted by the record. We disagree that this factor mandates a departure from our policy of requiring that all terms of the plea agreement be placed on the record. Notwithstanding the emphasis that has previously been placed upon the existence of record contradiction of the promise later being claimed, we believe that the purposes of the plea bargaining process would best be furthered in the usual case by refusing judicial recognition of any off-the-record promise once a record has been made of the terms of the plea agreement. The mere fact that the court failed to ask or the defendant failed to inform the court of the existence of other promises or inducements should not entitle that defendant to attempt to prove that other inducements led him to plead guilty, particularly where, as here, the defendant is represented in the plea bargaining process by experienced counsel.

Thus, once the terms of a plea bargaining agreement are placed on the record, judicial recognition of additional promises or terms of the agreement will not be forthcoming except in a rare case. Any other rule would serve only to undermine the goal of eliminating the secretiveness that has at times tended to surround the plea bargaining process. The court should, in every case, ascertain on the record that no other promises have been made on which the defendant might be relying. If the court fails to make this determination, however, it is nevertheless the defendant's

burden, on pain of losing the claimed promise, to inform the Judge accepting the plea of all promises that were made to induce his plea that are not otherwise revealed.

As the promise sought to be enforced by petitioner does not appear on the record of the prior criminal proceeding, it was unnecessary to hold a hearing to determine whether such a promise existed. In view of our disposition of this case, we need not reach the question of whether the prosecutor has the power to negotiate with a criminal defendant regarding potential future appearances before a Grand Jury.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion to quash or modify the subpoena should be denied.

COOKE, C. J., and JASEN, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

JONES, J., taking no part.

Order reversed, etc.

APPENDIX F

March 25, 1982 New York Court of Appeals Certification of Federal Question (*Matter of Benjamin S. (Kuriansky)*, 56 N.Y.2d 570, 450 N.Y.S.2d 186, 435 N.E.2d 403 (1982))

Motion for reargument, 55 N.Y.2d 116, 447 N.Y.S.2d 905, 432 N.E.2d 777, denied.

Motion to amend the remittitur granted, remittitur recalled and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Whether petitioner's federal constitutional rights are violated by the requirement that, once a record is made of the terms of a plea bargaining agreement, all promises made to the pleading defendant must be made a part of that record before they will be enforced.

APPENDIX G

March 5, 1981 Decision and Order of the New York State Supreme Court, New York County, Denying Petitioner's Motion to Withdraw His Plea (*People of N.Y.* v. *Siegel*)

McQuillan, J.:

Defendant pleaded guilty to perjury in the second degree in the Supreme Court, New York County, on January 21, 1980 (Melia, J.). He was sentenced on the same date to five years probation and a fine of $2500. Defendant did not appeal this conviction.

Approximately six months after defendant had pleaded guilty in New York County the Special Prosecutor subpoenaed him to testify before a Queens County Grand Jury. Defendant moved to quash or modify the subpoena so as to limit the subject matter of his testimony. The basis for the motion to quash or modify the subpoena was a plea bargaining agreement not placed on the record when defendant pleaded guilty before Judge Melia on January 21, 1980. Both the Supreme Court, Queens County (Balbach, J.) and the Appellate Division, Second Department, each basing the result on different reasoning, held that the plea bargaining agreement should be enforced. Both the Supreme Court, Queens County and the Appellate Division made factual findings regarding the scope and existence of the plea bargaining agreement; these findings were based on the record of a hearing held before Judge Balbach on August 28 and 29, 1980.

On February 18, 1982, the Court of Appeals reversed the order of the Appellate Division. Matter of Benjamin

S. v. Kuriansky, slip op. #2 at 1. The Court stated, *inter alia*: "We find it unnecessary to attempt to discern the scope and meaning of the statements made during the plea negotiations relative to petitioner's desire to avoid further involvement with the grand jury. Inasmuch as a record had been made of the terms of the plea agreement in the prior criminal proceeding, and the promise petitioner now claims was made is nowhere mentioned in that record, the claimed off-the-record promise is unenforceable . . . . we believe that the purpose of the plea bargaining process would best be furthered in the usual case by refusing judicial recognition of any off-the-record promise once a record has been made of the terms of the plea agreement. The mere fact that the court failed to ask or the defendant failed to inform the court of the existence of other promises or inducements should not entitle that defendant to attempt to prove that other inducements led him to plead guilty, particularly where, as here, the defendant is represented in the plea bargaining process by experienced counsel. Thus, once the terms of a plea bargaining agreement are placed on the record, judicial recognition of additional promises or terms of the agreement will not be forthcoming except in a rare case . . . . As the promise sought to be enforced by petitioner does not appear on the record of the prior criminal proceeding, it was unnecessary to hold a hearing to determine whether such a promise existed." *Id.* at pp. 3-5.

Defendant (petitioner in the Court of Appeals) has now moved, pursuant to CPL 440, for an order: (1) reopening the plea and sentence proceedings of January 21, 1980 to place on the record the terms of the plea bargaining agree-

ment at issue in Matter of Benjamin S. v. Kuriansky, *supra;* (2) "[v]acating and setting aside defendant's judgment of conviction and sentence on the ground that it was procured by misrepresentation on the part of the prosecutor and in violation of defendant's substantive due process rights under the United States Constitution and improperly imposed and otherwise invalid as a matter of law."

In an affirmation dated February 28, 1982, defendant's counsel, Harold I. Cammer, states that "[d]efendant has not made any prior application for the requested relief." While defendant has not made a prior application for the requested relief to this court pursuant to CPL 440, an application for such relief was made to the Supreme Court, Queens County, and ultimately denied by the Court of Appeals in Matter of Benjamin S. v. Kuriansky, *supra.* The relief sought in the case *sub judice* is effectively the same relief denied to defendant by the Court of Appeals. Under these circumstances, I must deny defendant's motion in all respects. *See* CPL 440.10, subd 3, par b, CPL 440.20, subd 3.

The foregoing constitutes the opinion, decision and order of the court.

Dated: March 5, 1982.

/s/ PETER J. MCQUILLAN

PETER J. MCQUILLAN
Justice, N.Y.
State Supreme Court

APPENDIX H

Constitutional Provisions and Statutes Involved

Section 1 of Fourteenth Amendment to United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to

establish by convincing evidence that the factual determination by the State court was erroneous.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.Y. Constitution, Article VI, § 3(a):

The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

N.Y. CPLR 5501(b):

The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found

new facts and a final judgment pursuant thereto is entered. * * *

N.Y. CPLR 5501(c):

The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal.

N.Y. CPL § 440.10(1)(h):

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

* * *

The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

N.Y. CPL § 440.20(1):

At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

82-1108

No. 82-

Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

Petitioner,

v.

STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy New York Attorney General for Medicaid Fraud,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Edward J. Kuriansky
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QUESTIONS PRESENTED

1. Whether a State may constitutionally require plea bargains between defendants and prosecutors to be placed on the record where they can be subject to scrutiny by the trial judge.

2. Where such a record is made and where the defendant, with the advice of counsel who knew or should have known that State law barred enforcement of concealed off-the-record promises, tells the judge that he relies on the record, is the court constitutionally required to recognize a subsequent allegation of an additional, implicit understanding between defense counsel and prosecutor.

3. Whether, assuming that the defendant is constitutionally entitled to prove that his plea was entered as part of an off-the-record understanding which he concealed from the sentencing judge, a de novo credibility finding by a

State appellate court that such a constructive agreement did exist is binding for federal habeas corpus purposes after the decision of that court has been overturned by the State's highest court on the ground that no factual finding was appropriate.

4. Whether, assuming there was a legally cognizable off-the-record understanding that in return for his plea of guilty to perjury the defendant would be entitled to permanently withhold evidence from state and federal courts, grand juries and Congress, he should be granted "specific performance," as opposed to an opportunity to withdraw the plea.

5. Whether certiorari should be denied where the delay necessitated by the litigation may permit petitioner to withhold evidence from a grand jury long enough to render it worthless.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1982 TERM

NO. 82 -

BENJAMIN SIEGEL,

Petitioner

v.

STATE OF NEW YORK and
EDWARD J. KURIANSKY,
Deputy New York Attorney
General for Medicaid Fraud,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, State of New York and Edward J. Kuriansky, its Deputy Attorney General for Medicaid Fraud Control, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, rendered October 22, 1982, is reported at 691 F.2d 620.

Prior court opinions, in chronological order, were:

-- an unreported decision of the New York State Supreme Court, Queens County, rendered December 17, 1980;

-- a decision of the Appellate Division of the Supreme Court, Second Department, rendered April 16, 1981, officially reported at 83 A.D.2d 630;

-- a decision of the New York State Court of Appeals, rendered February 18, 1982, officially reported at 55 N.Y.2d 116, rearg. denied, 56 N.Y.2d 570;

-- an unreported decision of a trial term of the State Supreme Court, New York County, rendered April 27, 1982; and

-- an unreported decision of the United States District Court for the Southern District of New York, rendered June 15, 1982.

COUNTER-STATEMENT OF THE CASE

The prolonged history of this case began in March of 1979, when petitioner Benjamin Siegel, a wholesale meat salesman, lied before a New York County grand jury investigating Medicaid fraud. He falsely swore, under immunity, that he had no knowledge of or involvement in the payment of kickbacks to nursing home operators and that he did not participate in any conversations about them.

Under indictment for three counts of perjury in the first degree, a Class D felony, Siegel offered, through his counsel, to plead guilty to a misdemeanor. The State prosecutor refused the plea unless Siegel would also agree to

cooperate with the grand jury's investigation. Siegel's counsel informed the prosecutor, in the judge's chambers, that their client was unwilling to do so because his commission sales would suffer if his cooperation ever became known to his customers. The prosecutor consequently insisted on a felony plea.

However, as one of his attorneys subsequently testified, Siegel's primary concern was not the level of the plea but rather avoiding a prison sentence. When the trial judge, on the basis of a preliminary probation report, promised not to impose a prison term, Siegel offered a plea of guilty to one count of perjury in the second degree, a Class E felony. Before accepting Siegel's plea, the judge questioned him in open court and Siegel confirmed that he was in fact guilty, that he understood the sentence promise, and that he was entering the

plea of his "own free will," fully aware of the rights that he was giving up. After Siegel's counsel assured the judge that "Your Honor fully understands the facts" and that "we rely on the record," a term of probation plus a $2,500 fine was imposed. No appeal was taken.*

About six months later, Siegel was subpoenaed by the same prosecutor's office to appear before a different grand jury, this one in Queens county, investigating kickbacks in the hospital industry. After Siegel's attorneys were unsuccessful in seeking to have the subpoena withdrawn on the ground of "double jeopardy," they "thought back over what

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* Contrary to the various intimations in the petition for certiorari, the judge never questioned the "validity" of the indictment. His earlier reference to a "gray area," cited at 4 and 11 of the petition, was made in rejecting a novel but highly technical attack on the draftsmanship. Petitioner's guilt of perjury was never seriously disputed.

had taken place" in New York County and moved to enforce an alleged plea bargain restricting the scope of Siegel's grand jury testimony to matters occurring in Queens after the date of his perjurious testimony in New York County. Testifying in support of that motion, both of Siegel's attorneys conceded that there had been "no discussion whatsoever" about his being absolved from further grand jury appearances. But they maintained when the prosecutor insisted that Siegel plead to a felony when he refused "to cooperate or to give any information to the Special Prosecutor's office in connection with -- as a condition of his plea," he was implicitly promising that Siegel would never again be compelled, before any state or federal grand jury, court, or even Congress, to give any information about "matters covered" in his original perjurious testimony. One

of Siegel's attorneys testified that the prosecutor said he "understood" the defense's concern "about this business of being required to give testimony and so on." From that, Siegel's attorney "gathered that he acquiesced." Siegel's other attorney agreed that the judge "was not part of our understanding."*

The prosecutor testified that while he had told Siegel's lawyers that he would not accede to a misdemeanor plea unless their client voluntarily agreed

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* This testimony by petitioner's own attorneys squarely refutes their current assertions, unsupported by any evidence or findings, that "the sentencing court was fully aware" of petitioner's "understanding" and that the judge "complied with the bargain." Petition at 5, 6, 10, 11. Similarly, the repeated intimation that this supposed understanding concerning future grand jury testimony was articulated during the unrecorded discussions "at the Bench" (id. at 4, 10) is inconsistent with the attorneys' testimony on this point as well as their testimony that that there had been "No discussion whatsoever" of it, even with the prosecutor alone.

to cooperate, he never made any promise to exempt Siegel from compulsory process if he pleaded guilty to a felony.

After hearing the testimony, the State court found, as fact, that the prosecutor had made "no promise * * * that petitioner would never have to testify before a Grand Jury" (emphasis in original). But it also found that he had given "equivocal answers" "when the possibility of future Grand Jury appearances was raised." Holding that the prosecutor was under "a duty to end that confusion," the court erected a promise by estoppel. It also held that Siegel was entitled to "specific performance."

On appeal, the Appellate Division of the State Supreme Court rejected the estoppel theory, noting, among other things, that Siegel's own attorneys each testified that the question to which the prosecutor supposedly gave equivocal

answers was never posed. But it reached the same result by making its own credibility finding that the prosecutor had knowingly assented to Siegel's desire to withhold evidence from future grand juries. It also agreed that specific performance of that constructive promise was the appropriate remedy.

The prosecutor appealed from both the factual and legal aspects of that decision to the State's highest court, the Court of Appeals. The Court of Appeals found no need to consider whether the evidence supported the Appellate Division's credibility finding, because the hearing should never have been held at all. It reversed under a settled principle of New York law that once the terms of a plea bargain are placed on the record, courts may not, except in the most unusual circumstances, recognize any other purported "promises, representations,

implications [or] the like." The only distinguishing factor in this case was the sentencing judge's failure to ask Siegel, in so many words, whether any off-the-record promises had been made; but the Court of Appeals held that while the judge should have made that inquiry, it was still the defendant's burden to place any promise upon which he seeks to rely on the record, at least where he is represented by experienced counsel. The court's refusal to recognize Siegel's belated claim also eliminated the need for it to decide whether a prosecutor's promise to permit evidence to be withheld from a grand jury could be specifically enforced.

Siegel then moved, before the trial term, to vacate his plea on the ground that it was induced by the same unkept "promise." Adhering to the Court of Appeals' decision that the alleged

promise could not be judicially recognized, trial term denied the motion.

After further State appeals were rejected, and stays denied by Associate Justice Marshall and by this Court en banc, Siegel filed a combination writ of habeas corpus and civil rights action in the Southern District of New York.

The District Court found, as a basis for the writ, that Siegel had a federal constitutional right to establish that his plea was the result of an off-the-record agreement. It held that although Siegel's failure to inform the sentencing judge of his understanding was a violation of New York law, it did not constitute a procedural default which would preclude federal consideration of it. As to whether such an understanding actually occurred, and what the appropriate remedy ought to be, the District Court concluded that it was

"bound by the findings" of the Appellate Division on those points even though the prosecutor's challenge to them had not been resolved by the State's highest court. The District Court therefore issued what it called a preliminary injunction "prohibiting the State Attorney General from questioning Siegel concerning matters discussed in the prior grand jury proceeding."

On appeal, the Court of Appeals for the Second Circuit reversed. It held that the State rule which barred recognition of off-the-record plea agreements -- in essence a statute of frauds -- was a constitutional method to attain "three important policy objectives." First, by making sure that the judge was aware of all inducements before he accepted the plea, the rule makes it more certain that the plea is a voluntary admission by a guilty person, and not the act of

an innocent person faced with an overly attractive inducement. Second, the rule eliminates the "clandestine atmosphere" in which secret deals between prosecutors and defendants can undermine the integrity, and the appearance of integrity, of the judicial system. Third, the rule helps assure the finality of judgments by preventing "indiscriminate post-conviction proceedings."

Turning to the facts of the case, the Circuit Court found that due process was satisfied when the State sentencing judge carefully interrogated Siegel, in the presence of his "two experienced attorneys," and had received emphatic assurances that he understood everything that was occurring and was pleading guilty of his "own free will." Because State cases dating back to 1974 had "made it clear that, to be enforceable, a plea bargain normally had to be on the

record," the Circuit Court recognized that "Siegel, through his counsel, knew or should have known, at the time of the plea, that off-the-record promises were unenforceable" and that application of the rule to him consequently did not violate federal due process. "Accordingly," it concluded, "Siegel is neither entitled to vacatur of his plea nor specific performance of the off-the-record constructive agreement found by the Appellate Division."

Because the District Court's preliminary injunction left no room for further legal or factual proceedings, the Circuit treated it as a final order and vacated the order with instructions to dismiss the case and enter final judgment for the defendants.

Siegel sought to delay the mandate by moving for reargument, which was denied, and for a stay pending this

application, which was granted on November 15, 1982. But the terms of the preliminary injunction did not bar the grand jury from questioning Siegel about matters which arose after his perjury, because he had "never claimed that the promise extends to events which occurred after March 1979 or to matters not otherwise covered by his previous testimony." Appellee's brief to the Second Circuit at 11, n. 6. Indeed, his counsel had explicitly assured that court, under oath, that:

> From the outset of the proceeding, plaintiff has been willing to be questioned * * * about any matter not covered by the plea bargain which concerned itself with plaintiff's prior testimony of March 13, 1979, before a New York County Grand Jury.

Affidavit of Eleanor Jackson Piel in opposition to a motion for an expedited appeal at 4. This was the same position that Siegel had taken in his original

motion attacking the scope of the Queens County subpoena: "[W]e concede that his testimony about such matters may be required." Affirmation of Eleanor Jackson Piel at 8.

Deciding to obtain at least that much evidence, the prosecutor directed Siegel to appear before the grand jury on December 1, 1982, stating in writing that he would be asked no questions that were barred by any injunction then in effect. But despite her prior concession that her client was required and willing to testify about matters beyond the "promise," Siegel's counsel declared that so long as the preliminary injunction concerning matters discussed in 1979 remained in effect, she would treat any demand that her client testify at all as "a nullity," and so advise him. Siegel consequently did not appear before the grand jury on December 1.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS SOUND AND IN CONFORMITY WITH THE LAW

The Court of Appeals for the Second Circuit was correct in holding that the New York Court of Appeals acted constitutionally in refusing to recognize petitioner's claim of a constructive plea bargain, concealed from the sentencing judge and never articulated to anyone until months afterwards, that he would be forever entitled to withhold evidence in consideration for his guilty plea to perjury.

The Circuit found that New York's insistence that plea bargains be placed, in their entirety, on the record, except in the most unusual circumstances [People v. Selikoff, 35 N.Y.2d 227, 244 (1974), cert. denied, 419 U.S. 1122 (1975)], and its corresponding refusal to recognize off-the-record "promises,

representations, implications, and the like" [People v. Frederick, 45 N.Y.2d 520, 576 (1978)], constitutes, in essence, a statute of frauds which serves three important policy objectives. One, it enhances the "certainty of guilt" by apprising judges of all inducements and thus enabling them to screen those so attractive as to be likely to override even an innocent person's desire to stand trial. Two, it protects the integrity of the judicial process, and the equally important perception of its integrity, by eliminating the "clandestine atmosphere" in which corrupt deals may flourish. Third, it assures finality by preventing "indiscriminate post-conviction proceedings" challenging the judgment. The Circuit therefore concluded that the holdings in Selikoff and Frederick do not violate federal due process:

> To the contrary, the rule promotes openness, certainty, and finality of plea proceedings. Furthermore, assuming the defendant is aware that off-the-record promises by the prosecutor are void * * * the memorialization in the record of all promises upon which he relies will best protect the defendant's post-conviction expectations.

691 F.2d at 624-25.

The Circuit recognized that petitioner's counsel, both with many years at the bar [83 A.D.2d at 632, n. 2], could not have been ignorant of the New York Court of Appeals' emphatic condemnation of off-the-record plea bargains in 1974 and again in 1978:

> In addition to their explicit holdings, both Selikoff and Frederick made it clear that "to be enforceable, a plea bargain had to be on the record. Indeed Frederick had expressly stated the defendant had the burden of placing on the record promises on which he relied and which he would seek to enforce in the future.

691 F.2d at 626-27, citing 45 N.Y.2d

at 526 (emphasis in original). "Thus," the Circuit concluded,

> Siegel, through his counsel, knew or should have known, at the time of the plea, that off-the-record promises were unenforceable, and therefore he should have undertaken to place his entire understanding of the plea bargain on the record for the trial judge's review -- as well as any possible appellate or collateral review."

Id. at 627.

The Circuit's thorough analysis of the law and the circumstances of this case answer most of the arguments made in the petition for certiorari.

The Circuit agreed with petitioner's initial premise (petition at 8) that Santobello v. New York, 404 U.S. 257 (1971), insures that if he had been the beneficiary of a promise that he could withhold evidence in return for entering a guilty plea, he would be entitled to "what is reasonably due in the circumstances." 691 F.2d at 623.

It differed as to what was reasonably due. Despite petitioner's superficial analysis of this case as "indistinguishable from Santobello (petition at 9), the prosecutor here did not admit making an explicit promise which a colleague failed to honor because he was unaware of it. It is undisputed that the prosecutor who accepted petitioner's plea was admittedly never told of his attorneys' off-the-record understanding that their client was seeking the right to withhold evidence forever. Even accepting the intermediate State court's finding that the prosecutor tacitly shared that understanding (see Point III), the Circuit recognized that because Siegel's counsel either knew or should have known that enforcement of it was clearly barred by State law, their reliance was "unreasonable" and hence not entitled to fulfillment under Santo-

bello. 691 F.2d at 627, n. 7.

Contrary to petitioner's argument, Blackledge v. Allison, 431 U.S. 63 (1977), does not "reject the very rule" at issue here (petition at 10) or in any way prohibit states from requiring that plea bargains be placed on the record. In that case the defendant had pleaded guilty under a de facto rule which was exactly the opposite. Under what was then North Carolina practice, defendants were required to fill out a routine form asking "yes" or "no" as to whether they had been influenced by any promises or threats. Allison swore that he had been promised a ten-year sentence, but was told by his counsel to answer negatively "so that the court would accept the plea." 431 U.S. at 69.

> The litany of form questions followed by the trial judge at arraignment nowhere indicated to Allison (or indeed to the lawyers involved) that plea bargaining was

> a legitimate practice that could be freely disclosed in open court. Neither lawyer was asked to disclose any agreement that had been reached, or sentencing recommendation that had been promised. The process thus did nothing to dispel a defendant's belief that any bargain struck must remain concealed -- a belief here allegedly reinforced by the admonition of Allison's lawyer himself that disclosure could jeopardize the agreement.

Id. at 77.

The distinction between Allison's plea under that clandestine and hypocritical system, and Siegel's under the New York rule, could hardly be more vivid. As the Circuit noted, New York unequivocally recognizes the legitimacy of the plea bargaining process and not only permits, but requires, that the results be fully and freely disclosed to the judge on the record. 691 F.2d at 620. In this case, that record in fact does show just such an agreement: the judge's openly made and openly performed

promise concerning sentence. In stark contrast to Blackledge, there was simply nothing here to encourage petitioner to believe "that any bargain struck must remain confidential." On the contrary, he had to know through his attorneys that he was obliged to speak fully then or forever hold his peace. The Circuit therefore concluded that rather than frustrate defendants' legitimate expectations, as the old North Carolina practice did, the New York rule was designed to "best protect them" and to insure what Blackledge cited as "the chief virtues of the plea bargaining system -- speed, economy, and finality." 691 F.2d at 625, citing 431 U.S. at 71.

The Circuit also explicitly rejected the argument that Boykin v. Alabama, 395 U.S. 238 (1969), required the State judge to ask petitioner, in so many words, if there was a concealed under-

standing (petition at 12). It held that neither Boykin nor any of its own opinions imposed a constitutional duty on State judges to recite any "specific catechism" in order to assure the voluntariness of a plea. 691 F.2d at 626.* The Circuit noted that petitioner had personally told the State judge that he was pleading guilty of his "own free will" and understood "everything that has happened here today." "Siegel and his two experienced attorneys made no mention on the record of the alleged agreement not to require testimony about the subject matter of his prior grand jury testimony * * * ." Without even mentioning the attorney's

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* Petitioner's assertion that the Circuit overlooked the "critical fact" that the judge neglected to ask this question (petition at 4, n.) is thus demonstrably incorrect. The Circuit simply did not find the omission to be constitutionally significant.

added assurance to the sentencing court that "Your Honor fully understands the facts" and that "we rely on the record" [minutes of sentencing at 7-8], the Circuit concluded that the judge's colloquy with petitioner was sufficient to assure the voluntariness of his plea under Boykin, and that "due process" did not entitle him to subsequently assert that a concealed understanding had been critical to his decision to plead guilty. 691 F.2d at 626. The Circuit's reading of Boykin was correct.

Moreover, this claim need not have been reached, and should not be considered by this Court, because it had not been fairly presented to the State courts. Picard v. Connor, 404 U.S. 270 (1971); Anderson v. Harless, ___ U.S. ___, 103 S.Ct. 276 (1982). Although petitioner had claimed that the Selikoff-Frederick rule should not be

applied unless the defendant explicitly denies that any off-the-record inducements exist [55 N.Y.2d at 120-21], it was not until petitioner's brief to the Circuit did he contend that Boykin imposed the burden of seeking an express disclaimer on the court.

The Circuit also rejected petitioner's contention that this application of the Selikoff-Frederick rule was unpredictable. Petitioner had argued there, as he does here (petition at 6, n.), that prior New York decisions, including Chaipis v. State Liquor Authority, 44 N.Y.2d 57 (1978), gave him the right to enforce off-the-record promises whose existence was not expressly refuted by the record. The Circuit correctly noted that Chaipis held no such thing. 691 F.2d at 627, n. 7. Nor do the other State cases cited by petitioner support any right to a hearing to establish the

existence of an agreement which, if it did exist, was entitled to no recognition as a matter of law. People v. Frederick holds precisely the contrary.

The Second Circuit did not address seriatim the various decisions by other circuits which petitioner now claims are in conflict with it (petition at 14). But, as it recognized, this is a "novel issue" because only New York, with its extraordinary volume of cases and consequent need for effective and final dispositions, has explicitly announced a "policy of enforcing only those portions of a plea agreement which are actually placed on the record at the plea proceeding." 691 F.2d at 621. Thus no other circuit has dealt with an off-the-record understanding which the defendant knew or should have known to be unenforceable. Indeed, the majority of cases cited involve off-the-record promises by

federal prosecutors, which, notwithstanding Rule 11 of Federal Rules of Criminal Procedure, can be judicially recognized in an appropriate case. Cf. Fontaine v. United States, 411 U.S. 213 (1973). As the Circuit noted, the sole issue here is whether the due process clause of the Constitution requires recognition of a constructive promise which petitioner knew or should have known to be unenforceable under State law. 691 F.2d at 621, 626, 627. No federal case so holds, and absent a rule like New York's in any other State, there is not even a possiblity of a conflict between circuits. There is simply a strong and consistent State rule which, even making the dubious assumption that Siegel's lawyers were ignorant of it in 1980, could surely escape no competent New York lawyer after its reaffirmation in this case.

II. PETITIONER HAS SHOWN NO CAUSE FOR VIOLATING THE STATE'S PROCEDURAL REQUIREMENTS

The Circuit Court's extensive review of the Selikoff-Frederick rule was more searching than was required. It was not necessary to agree with all the salutary policies behind the rule, as that court did, to sustain it. It is sufficient that New York, in the exercise of its "initial responsibility for vindicating constitutional rights," has adopted a rule legitimately designed to enable its judges to do so and which petitioner showed no cause to ignore. Engle v. Isaac, ___ U.S. ___, ___, 102 S.Ct. 1558, 1571-73 (1982); Wainright v. Sykes, 433 U.S 72 (1977).

As the Circuit recognized, the Selikoff-Frederick rule was intended to vindicate constitutional rights. Among other things, it assures, as Boykin v. Alabama requires, that judges are

apprised of the facts needed to decide whether a plea has been voluntarily entered. It assures, in fairness to both the defense and prosecution, that any inducements are promptly memorialized before that judge so that they can be neither fabricated nor denied nor distorted later on; in other words, to make sure that the defendant will get neither more nor less than what is "reasonably due." Santobello v. New York, 404 U.S. at 262.

Like the requirement of a contemporaneous objection to rulings at trial, the rule that plea bargains be made a matter of record is thus designed to insure that the State proceedings "be as free from error as possible." Wainright v. Sykes, 433 U.S. at 90. Pursuant to that rule of procedure, New York denies defendants the right to bring belated claims of off-the-record agreements or

understandings. 55 N.Y.2d at 121. The Circuit therefore could have decided the case solely on the principle that where "a procedural default bars state litigation of a constitutional right, a state prisoner may not obtain federal habeas corpus relief absent a showing of cause and actual prejudice." Engle v. Isaac, ___ U.S. at ___, 102 S.Ct. at 1572.

Petitioner demonstrated no cause for ignoring the well-established State rule, except for the discredited argument that his two highly experienced lawyers could not have anticipated its application. Of course, even a bona fide unawareness of the law does not automatically excuse every procedural default. Engle, 102 S.Ct. at 1574-75. Moreover, counsel did not merely neglect to alert the State judge to the alleged understanding. They affirmatively misled him by saying that they were sure

that he "fully understands the facts," and that they were content to "rely on the record." Ignorance of the law can neither excuse nor even explain that conduct. Nor should petitioner be heard to claim actual prejudice simply because the law did not allow him to eschew that reliance at his pleasure.

In short, the State exceeded its burden by convincing the Circuit that its procedural rule was one which will "best protect the defendant's post-conviction expectations." 691 F.2d at 625. It is enough for constitutional purposes that the rule was reasonably calculated to bring such claims to the attention of State judges in a contemporaneous, complete, and reliable way. Certiorari should not be granted where petitioner has not even come close to a presenting a valid excuse for having flagrantly violated that rule.

III. SUMNER v. META IS INAPPLICABLE

Petitioner's remaining contention is that the Circuit Court violated Sumner v. Meta, 449 U.S. 539 (1981), by "ignoring" the factual finding by the State Appellate Division that the prosecutor had shared defense counsel's belief that if their client pleaded guilty to committing perjury before the grand jury he would be entitled to withhold certain evidence in the future (petition at 16-18). He is wrong.

The Circuit did not ignore this finding. On the contrary, its decision was explicitly premised on "the off-the-record constructive bargain found by the Appellate Division." 691 F.2d at 625. But it held that petitioner's "purported reliance on the constructive promise found by the Appellate Division was unreasonable as a matter of law" because, as he knew or should have known,

it was "a nullity at the time the plea was accepted." 691 F.2d at 627, id. at n. 8. In essence, the Circuit assumed arguendo that there may have been a constructive off-the-record promise, but agreed with the State Court of Appeals that, "[w]hatever understanding may have been reached" was unenforceable as a matter of law, and thus the "scope and meaning of the statements made during the plea negotiations" were irrelevant. 55 N.Y.2d at 119-20.

The higher courts' assumption of such an agreement for purposes of their analyses of course does not mean that they were obligated to accept the Appellate Division's findings as true for all purposes. The actual existence of a tacit meeting of the minds between defense attorneys and the prosecutor has never been finally resolved so as to be binding as a matter of law.

As noted by the New York Court of Appeals, the two lower states courts had not agreed on this question. The hearing court believed that "no definite promise had been made regarding future grand jury testimony," but effectively created such a promise by estoppel. 55 N.Y.2d at 119. The basis of the estoppel was the prosecutor's failure to end the "confusion," which supposedly was generated when petitioner's counsel stated "on several occasions * * * that their client was deeply concerned about future New York Grand Jury appearances." Petitioner's appendix at 44a- 45a.

The Appellate Division recognized that that premise had "no support in the record and cannot be affirmed" because "petitioners' own counsel testified that there had been no specific discussion of further Grand Jury appearances." 83 A.D.2d at 633. The Appellate Division

also held that plea bargains could not be created by estoppel, only by knowing consent, and thus if, as the trial court found, confusion had separated the two sides, the defense's unilateral "impression" of an agreement could not be given effect. Id.

It then made its new findings of fact. At the hearing, the prosecutor testified that he recalled mentioning during plea negotiations that a future grand jury subpoena was possible, a statement which defense counsel stated she did not recall hearing. The Appellate Division reasoned that if the prosecutor's testimony were credited, it would have to reverse. It therefore inferred that the lower court -- although it had decided the case on an entirely different theory and never mentioned that testimony -- must have made an "implicit finding" that the prosecu-

tor was not credible on that point. The appellate court then extrapolated that into a finding that he was also lying about his state of mind. Id. at 634.

The court also cited testimony that the prosecutor had indicated his assent to defense counsel's proposal that their client not be required to "'give information,' 'talk about,' or 'be questioned about' the matters covered in his perjury indictment." Id. at 632. But those words were taken out of context: what petitioner's counsel testified that she proposed was merely that he "not be asked to cooperate or give any information to the Special Prosecutor's office in connection with -- as a condition of his plea." Minutes of hearing at 29. In other words, petitioner asked for no more than the right to enter a lesser plea with a guarantee of no prison sentence and without having

to make any affirmative commitment in return. That is what the record shows occurred. If the prosecutor had also consented to absolve petitioner from compulsory process forever, neither he nor petitioner's counsel ever said a word about it, on or off-the-record.

Petitioner insists that under the federal habeas corpus statute, the Appellate Division's finding of a constructive agreement must be presumed correct. 28 U.S.C. §2254(d). "That presumption, however, generally attached only to determinations of historical fact, 'made by the judge who heard the evidence, for only he is in a position to evaluate the credibility of the witnesses.'" White v. Finkbeiner, 570 F.2d 194, 201 (7th Cir. 1978); citing Hill v. Nelson, 466 F.2d 1346, 1348 (9th Cir. 1972). Under this general rule, deference is due only to the hearing

court's assessment that the negotiations ended in "confusion," not in agreement.

Petitioner cites Sumner v. Mata for the proposition that factual determinations by appellate courts are also presumed correct under §2254(d). But Sumner involved questions concerning the fairness of a pretrial identification procedure, raised for the first time on appeal and concededly capable of resolution solely upon the trial court record. 449 U.S. at 543, 546. This Court was not presented with a de novo credibility finding by an appellate court, and thus had no occasion to hold whether the "material fact" that a witness had not testified truthfully can be adequately "developed," within the meaning of §2254(d)(3), through an examination of a an appellate record or whether such a finding constitutes the kind of "full and fair" determination which 28 U.S.C.

§2254(d)(2) requires.

But even if such a finding could be deemed the equivalent of an assessment by the judge who actually heard the testimony, in this case the merits of the crucial factual dispute were never "resolved" by the State courts within the meaning of §2254(d)(a), and thus neither version can validly be "presumed to be correct." The New York Court of Appeals was asked to review the record to determine whether there was any evidence to support the Appellate Division's de novo finding as to what was in the prosecutor's mind. 55 N.Y.2d 117. Rather than leave that finding "undisturbed," as petitioner claims (petition at 17), the Court of Appeals effectively vacated it by holding that the hearing upon which it was based should not have been held in the first place. Id. at 121. Because it agreed with that

holding, the Circuit Court had no reason to decide which finding, confusion or agreement, or neither, should be treated as correct for purposes of federal habeas corpus proceedings.

Thus, if the New York Court of Appeals and the Circuit were found to be wrong in holding that petitioner's understanding was a nullity upon which he could not reasonably rely, further hearings, probably before the District Court, would be essential to determine whether, in fact, there had been a "promise" or its equivalent made somewhere in the inner recesses of the prosecutor's mind.*

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* Petitioner's assertion that his allegations are now established beyond question because they were not denied in respondents' answer in the District Court (petitioner at 3, n.) is disingenuous. There has been no answer filed yet simply because the appeal was taken from a preliminary injunction.

And if it were then found that the prosecutor did constructively promise petitioner that he could withhold evidence from federal and state grand juries, courts and even Congress, as his counsel maintained, the State Court of Appeals would have to resolve what this Court has held to be within the State courts' discretion, namely whether the "ultimate relief" to be accorded petitioner should be "specific performance" or the opportunity to withdraw his plea. Santobello v. New York, 404 U.S. at 262-63.

This question, too, had been presented to the State Court of Appeals but not reached. The prosecutor had argued that under State precedents and public policy he had no power to bargain away a grand jury's right to evidence, and that specific performance of such a bargain was anathema to the principle

that the law is entitled to every man's evidence. 55 N.Y.2d at 117. But again, the court's holding that the alleged off-the-record promise could not be recognized rendered resolution of this issue unnecessary. Id. at 121.

The mere existence of these open issues of fact and law does not, in and of itself, prevent the granting of a writ of certiorari. But it should be recognized that the record is far from being as "unclouded" by unresolved subsidiary issues as petitioner blithely claims (petition at 3, n.). More importantly, the virtual certainty that this Court would have to remand to either the State or federal courts, or both, if petitioner's threshold contention were accepted renders it likely that the time consumed would deprive the State of a meaningful opportunity to successfully litigate those points. See point IV.

IV. A FURTHER STAY WILL EITHER MOOT THE CASE OR OTHERWISE IRREPARABLY PREJUDICE THE STATE

Petitioner has avoided giving truthful testimony about his knowledge of kickbacks and other abuses of the Medicaid program since he was first subpoenaed by a New York County grand jury in March of 1979. Contending that he was "promised" that he would never have to testify about "matters" covered by that perjurious testimony, petitioner has strung together a series of stays and injunctions dating from the issuance of a second grand jury subpoena in July of 1980 and continuing to the present. Under Rule 41(b) of the Rules of Appellate Procedure, the current stay will continue until final disposition by this Court. If a writ of certiorari is granted, however, the State's need for the evidence is likely to be totally frustrated, and what is left of the case

and controversy rendered virtually moot.

Petitioner conceded to the Circuit Court that he has "never claimed that the promise extended to events which occurred after March 1979 or matters not otherwise covered by his previous testimony." Brief at 11, n. 6. But New York's Statute of Limitations requires that a prosecution be commenced within five years or less of any white-collar crime. N.Y.C.P.L. §30.10 (McKinney's). Thus, even if petitioner were to appear in the grand jury now, and at long last give the pre-March 1979 evidence he has been withholding, only felonies committed in whole or in part after early 1978 could still be prosecuted. If this Court were to grant certiorari, a final disposition could not be reasonably expected until the Spring of next year -- at which time any prosecution of any fraud occurring before March of 1979

would be time-barred. As a result, even if the State were to prevail as it has in the State and Circuit Courts of Appeal, its victory would be Phyrric because the evidence it fought so long to acquire by then might be all but worthless.

Assuming petitioner prevailed in the contention that an off-the-record constructive promise such as found by the State Appellate Division must be recognized, additional proceedings would be necessary to finally determine whether such a promise had in fact been made. See Point III at 36-40. If the State were ultimately to succeed in finally establishing that no constructive promise had been made, even more time will have been consumed and the evidence will have become even staler.

Even if petitioner were to succeed in establishing both the legal validity

and factual existence of the alleged promise, the State Court of Appeals would still have to determine the appropriate remedy. See Point III at 43-44. But the prosecution's position, which is that law and public policy preclude licensing anyone to withhold relevant evidence, will again be mooted by the passage of enough time to put petitioner in or close to the same position as "specific performance" of a promise not to compel his testimony.*

In sum, granting the application for a writ of certiorari would have virtually the same effect as a reversal on the merits because petitioner will have achieved the functional equivalent

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* Indeed, by that point, it would probably be to petitioner's advantage to agree that withdrawal of the plea was the proper legal remedy all along, allowing him to enjoy the benefits of both remedies.

of specific performance of an alleged off-the-record promise, in patent violation of State law, which the prosecutor contends was never made.

Moreover, to whatever extent petitioner's evidence might still be worth something at the conclusion of all this litigation, it is doubtful that he would even give it. Despite his counsel's sworn statement that petitioner had been willing "from the outset" to testify "about any matters not covered by the plea bargain which concerns itself with [his] prior testimony of March 1979," petitioner has recently refused to appear before the grand jury, even under a written assurance that his testimony would be so limited. See counter-statement of the case at 15-16. Given this unjustified and unjustifiable conduct, the most likely outcome of all this protracted litigation will be that

petitioner will be found in contempt for his categorical refusal to appear before the grand jury, irrespective of any limitation that the alleged promise might have placed on the questions that could have been propounded had he appeared. Having added contempt to his earlier perjury, petitioner comes before this Court without clean hands, candor, or any demonstrable stake in the outcome. Equitably and legally, he has surely forfeited any right to be heard.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 82-1108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

Petitioner,

v.

THE STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy Attorney General for Medicaid Fraud,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI

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No. 82-1108

In the United States
Supreme Court
October 1982 Term

BENJAMIN SIEGEL,

Petitioner,

-- against --

STATE OF NEW YORK and
EDWARD J. KURIANSKY, etc.,

Respondents.

On Petition
For a Writ of Certiorari
To the U.S. Court of Appeals
For the Second Circuit

PETITIONER'S REPLY BRIEF

Respondents' opposing brief in a number of separate ways confirms, it does not refute, the need for review in this case:

First, the essential infirmity with both the Panel ruling below and the opposition brief, is that, if there were the

New York "statute of frauds" plea bargain rule they assert, it would be unconstitutional, in violation of Santobello (404 U.S. 757), Blackledge (431 U.S. 63), and Boykin (395 U.S. 238). Due process requires enforcement of a prosecutor's promise which induces a plea, especially, as as here, where that bargain not only is uncontradicted by the record but has been proven at a hearing actually held.* At a

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* The opposing brief (at 21), like the deciding Panel below (Pet. App. A at 15a), moreover incorrectly suggests that petitioner "knew or should have known" of the newly created "statute of frauds" for plea bargains applied for the first time in this case. As we have shown (footnote at p. 8 of Pet.), there was no such rule. This is further demonstrated in this very case by the fact that it was unknown to the Queens County trial court (Pet. App. C), to the unanimous five member Appellate Division (Pet. App. D), to District Judge Sweet (Pet. App. B), and indeed (before this case) to the Second Circuit itself when, in Palermo v. Warden of Greenhaven Prison, 545 F.2d 286 (2d Cir. 1976), stating that prosecutors must be held to "meticulous standards of both promise and performance," it affirmed the enforcement of an oral off-the-record plea bargain.

minimum, in light of the failure of the allocution record in this case fully to demonstrate its voluntariness, petitioner was entitled to a hearing, denied him by the final state rulings and the Second Circuit, whether to vacate his plea.

Second, respondents incorrectly attempt to create factual issues when there are none. To do so they (a) misleadingly and selectively quote the state court hearing transcript in a way which distorts its actual contents and (b) omit to note that they made these very same arguments in the state trial court, in the appellate division, and again in the district court. In rejecting these contentions, including the baseless and false assertion that the plea bargain proven in this case was "concealed" from the sentencing court, these fact-finding courts did not accept respondents' version of the facts (see, e.g., Pet. App. C at

38a). Petitioner's Statement of the Case, in contrast, relies solely on the unrebutted factual statements in his moving papers below and in the opinions of the three fact-finding courts in this case. See Pet. Apps. B, C, and D.

Third, respondents assert by fiat (Resp. Br. at 34), not reasoned argument, that Sumner v. Mata, 449 U.S. 535, does not apply. But Sumner teaches that in a Section 2254 case the federal court may not circumvent state court factual findings by the expedient of relabeling questions of fact as questions of law -- yet that is precisely what the Second Circuit did below.*

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* Nor is it true, as the prosecutor states (Resp. Br. at 26), that petitioner had not fairly presented his claims to the state courts. This submission ignores petitioner's N.Y. CPL Article 440 motion, based on his unrebutted affidavit testifying to his reliance and to the in-

[Footnote continued on next page:]

Fourth, respondents' brief, implicitly premised as it is on the unconstitutional and inequitable notion that the prosecutor unilaterally may abrogate an agreement he made, is further inappropriate because its claim of prejudice seriously misrepresents the true facts of his recent request for further testimony from

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[Footnote cont. from p. 4:]

voluntariness of the plea if the bargain were not upheld (Appendix below at AA43), to withdraw his plea among other things because of the ambiguous allocution record's failure to satisfy Boykin, but the state denied him a hearing. See Pet. at p. 7 and App. G. See also Suggs v. LaVallee, 570 F.2d 1092, at 1117 (2d Cir. 1976).

In light of petitioner's request in the district court for this alternate relief, foreclosed by the Panel below (see Pet. App. A at 15a), the most the prosecutor's desperate attempt to create factual issues shows is how wrong it was for the Panel to order a dismissal before the district court at the least held a full hearing to resolve respondents' non-record contentions.

It should not be forgotten that this is a request to review a final judgment dismissing the petition/complaint on a pre-answer appeal from a preliminary injunction.

petitioner. Because these misstatements are aggravated by the circumstance that these "facts" are nowhere in the record, however, we will refrain from demonstrating their falsity. It suffices to note that respondents made essentially the same argument in opposition to petitioner's App. Rule 41(b) motion below for a stay pending this Court's action on his petition for certiorari, but the Second Circuit nonetheless granted the stay.

Conclusion

The petition should be granted.

Respectfully submitted,

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January 18, 1982